VOL. 41 (2d Series) JUNE 22, 1973 No. 2

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(41 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 41 (2d Series)

Pages 145 to 234

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

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Washington, D.C. 20402 - on a subscription basis

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F.C.C. 73-590

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 74, SUBPART H, OF THE COMMISSION'S RULES AND REGULATIONS ON TELEVISION BROADCAST BOOSTER STATIONS	Docket No. 19756

NOTICE OF PROPOSED RULEMAKING

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION:

1. As a result of our Task Force study on re-regulation of broadcasting, the Commission has under consideration the matter of deleting Subpart H, concerning Television Broadcast Booster Stations, Part 74 of our Rules and Regulations.

2. Such stations are essentially co-channel amplifying transmitters by which the licensee of a UHF TV broadcast station may boost its signal where it is of low intensity within the station's theoretical Grade A contour.[1] Power is limited to that which is necessary for an adequate signal over the area to be served by the booster, but, in no event, is to exceed an effective radiated power of 5 kilowatts peak visual. A TV booster must be for direct reception by the public. It may not be used for a point-to-point relay system.

3. Rules implementing the service of television broadcast booster stations were promulgated by Report and Order in Docket No. 11331, adopted May 20, 1960. 20 Pike and Fischer R.R. 1505.

4. Since that time, only two such booster stations have been authorized (construction permits), i.e. to WINR-TV (now WICZ-TV), Binghamton, N.Y., on September 20, 1960 (BPTB-1); and to KLYD-TV (now KJTV), Bakersfield, California on December 1, 1961 (BPTB-2). Neither was ever licensed. Each was cancelled at the request of the permittee after two-and-one-half months.

5. Lack of interest in or utilization of this service appears to have resulted from at least two practical considerations: First, inherent in the co-channel operation of TV boosters are technical difficulties of avoiding undesirable interference. Second, the use of TV translators has been a satisfactory and preferable alternative.

6. Our experience with the television broadcast booster service indicates that it has served no useful purpose, and in view of the attendant interference problems, we conclude that the rules should be reviewed for possible deletion. There have been no applications filed in this

[1] The radius of such Grade A contour is specified as 68 miles on hypothetical assumptions of operation with an effective radiated power of 5000 kilowatts from an antenna 2000 feet above average terrain and over a transmission path of normal terrain.

109-043—73——1

service for 12 years. There are no stations presently authorized under this subpart. None has ever been licensed. Moreover, because conventional translators are available, it appears unlikely that there will be any requests for television booster stations in the future.

7. Subpart G, Television Broadcast Translator Stations, Part 74, provides for boosters of UHF translator stations. There are nine such UHF translator signal boosters currently licensed. This proceeding does not, of course, affect the Subpart G booster operations.

8. Pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, IT IS PROPOSED TO AMEND Part 74 by deleting the provisions of Subpart H in their entirety and designating it as Reserved.

9. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before July 16, 1973, and reply comments on or before July 26, 1973. All relevant and timely comments will be considered by the Commission before final action is taken. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

10. In accordance with the provisions of Section 1.415 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs and other documents shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C. (1919 M Street, N.W.).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-600

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE CREATION OF A NEW CLASS OF CITIZENS RADIO SERVICE AND THE REALLOCATION OF FREQUENCIES BETWEEN 224 MHz AND 225 MHz IN THE BAND 220–225 MHz NOW ALLOCATED FOR SHARED USE BY STATIONS IN THE AMATEUR RADIO SERVICE AND GOVERNMENT RADIOLOCATION STATIONS FOR THAT PURPOSE	Docket No. 19759 RM-1633, RM-1656, RM-1747, RM-1761, RM-1793, RM-1841.

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING

(Adopted June 6, 1973; Released June 12, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. Notice is hereby given in the above captioned matter.

2. The following petitions have been received which are applicable to this matter:

a. RM-1633 (Wayne Green petition) filed May 25, 1970—Proposes to make part of the 220 MHz amateur band available for "Hobby Class" amateurs and to limit 27 MHz Citizens Band operations to "business and personal business" use.

b. RM-1656 (Reed Electronics School petition) filed June 24, 1970—Proposes to move Citizens Band from 27 MHz to the 220 MHz amateur band and to return 27 MHz frequencies to U.S. Government.

c. RM-1747 (EIA petition) filed February 5, 1971—Proposes a new "Class E" Citizens Band service between 220 and 222 MHz; 80 channels; 25 kHz channels; 100 watts maximum power. Would not alter Rules for 27 MHz Citizens Band.

d. RM-1761 (F. C. Hervey petition) received February 26, 1971—Proposes to shut down 27 MHz Class D Citizens Band as now provided in "Parts 95 and 15" temporarily and reassign frequencies "to those Mobile Radio Services in greatest need"; and to create a new "Hobby/Personal Radio Service" in parts of the 220–225 MHz band as a substitute for present class D Citizens Band.

e. RM-1793 (George Jacobs and Stewart Meyer petition) filed May 10, 1971—Proposes to establish a new "VHF Radiotelephone License" in the Amateur Radio Service anywhere above 144 MHz (suggests 221–224 MHz); phone only; 100 watts maximum power; no code test. Would not change Citizens Band rules.

f. RM-1841 (United CB'ers of America) filed July 1, 1971—Proposes to use 27 MHz for "Hobby (Class H)" use only; transfer "all emergency and call channel operations" to 220 MHz.

3. All of the foregoing petitions propose, in various ways, Citizens Radio use of a portion of the band 220–225 MHz and will be considered in this proceeding. The most detailed petition was submitted by the Electronic Industries Association (EIA). As proposed by EIA in RM-1747 a new Class E category in the Citizens Radio Service would be created for the same type of use now authorized to Class D category stations, i.e., personal and business radiocommunications. As

proposed, the Class E category would provide 80 FM channels occupying 2 MHz within the 220-225 MHz frequency band. Channels would be allocated for specific types of communications, e.g., intra-station, inter-station, business, weather advisory, emergency, marine, in-plant, traffic control, etc. Most Class E stations would be authorized 25 watts power output. A small number of channels would be reserved for one watt, local use stations. Certain public safety agencies would be licensed to operate Class E stations at 100 watts for use in emergencies. Antenna structures could be either 20 feet above the nearest man-made or natural object within 500 yards, or 60 feet above existing terrain. Licensees would be required to notify the Commission and the Federal Aviation Administration should antenna height exceed the maximum permitted near airports. The petition proposes a simplified licensing procedure which includes self-assigned station call signs. The petition further proposes that a station could be placed into operation immediately upon filing of the application and, should the Commission fail to act upon the application within 30 days, the license would automatically become validated. While the petition does not contain an estimate of the size potential for the proposed Class E category, informal estimates run as high as 10 million licensees. The Commission is also in receipt of considerable correspondence both in favor and in opposition to the reallocation of the band for any uses other than are now authorized. The American Radio Relay League, Inc., (ARRL) has filed a petition in opposition to that of EIA (RM–1747) requesting denial of the EIA petition and that the Commission issue a notice of inquiry inviting suggestions and proposals for increasing the efficiency and effectiveness of the Citizens Radio Service.

4. The band 220–225 MHz is currently allocated internationally in Region 2 to the Amateur and Radiolocation services on a co-equal basis. Nationally, however, Radio-location is the primary service and Amateur the secondary service. The latter service is further constrained by footnote NG13 to the national Table of Frequency Allocations specifying that in an area in Texas and New Mexico about 175 miles wide and 110 miles in latitude centered essentially on the White Sands Missile Range, normal amateur operations are not permitted in the band between 5:00 AM and 6:00 PM, Monday through Friday. In view of the Government use of the band for radiolocation, the Commission has inquired as to the possibility of the band being shared with some form of Citizens Radio Service operations. The Director of the Office of Telecommunications Policy has advised that sharing to accommodate additional operations of a disciplined Citizens Radio Service would be practicable in the band 223–225 MHz. Such use would be subject to reception of possible interference from radiolocation operations, particularly in coastal, North Central and the Northwestern areas of the United States. Moreover, operations would not be permitted between the hours of 5:00 AM and 6:00 PM, Monday through Friday in the areas around the White Sands Missile Range, New Mexico, and in Franklin and Gulf counties in northwest Florida. These limitations, as well as the views of the Director, Office of Telecommunications Policy on this matter, are set forth in Appendix 2

of this Notice. (Letters dated August 19, 1971 and March 29, 1972, with attachments).

5. As implied above, the use of a portion of the band 220–225 MHz for other than Amateur or Radiolocation services would be a derogation of the international Table of Frequency Allocations of which the United States is a proponent. Therefore, it is possible that objections from Canada and Mexico may require a prohibition against any other operations in some border areas. Pending resolution of that matter, mobile stations would be constrained from operations within ten miles of the border and base stations within 25 miles of the border. If suitable arrangements with Canada and Mexico can be effected, this prohibition may be modified to conform to the nature of the agreement.

6. The Citizens Radio Service was established by the Commission in 1945 (Docket No. 6651) as a radio communication service of fixed, land, and mobile stations intended for short distance personal or business communications, and for radio signalling and control of remote devices by radio. Due to a lack of suitable low cost equipment for the then existing Classes A, B, and C services, Citizens Radio grew slowly and reached a total of only 40,000 licensees by 1958. At that time it was decided to establish a Class D Citizens Service in the 27 MHz region to permit voice communications of a general or business nature. Although interference had to be accepted from Industrial, Scientific and Medical (ISM) equipment, to which the frequency 27.12 MHz was primarily allocated, it was believed the Citizens Radio Service, due to its relatively low priority, could nevertheless make effective use of the spectrum. Consequently, although not ideally suited to the short distance concept of the Citizens Radio Service because of its sporadic long distance transmission characteristics, the 27 MHz region was allocated for such use. It was expected that equipment operating in the 27 MHz band could be produced at considerably less expense than equipment operating in VHF or UHF bands. Growth has been phenomenal, with the number of licensees increasing from 49,000 in 1959 to 868,013 in 1971.

7. The 27 MHz Class D Citizens band is divided into twenty-three channels with seven channels authorized for communications between units of different stations and one channel to be used solely for emergency communications involving the immediate safety of life and the immediate protection of property, or communications necessary to render assistance to a motorist. A wide variety of communications is permitted in the Class D Citizens Radio Service. As the number of licensees increased, however, so did complaints against the use of the service for the transmission of long duration base-to-base messages, hobby type communications, technical violations such as use of high powered amplifiers, and general pollution of the spectrum. Such abuses resulted in certain prohibitions against the Class D CB Service, including: (1) communications as a hobby or diversion; (2) transmission of obscene, indecent or profane words, language or meaning; (3) communications not directed to specific stations or persons; (4) the transmission of advertising or soliciting the sale of any goods or services; (5) transmission of music, whistling, sound effects or any material for amusement or entertainment purposes; (6) communications about the

technical performance of equipment; (7) relaying messages for a person other than the licensee or member of his immediate family.

8. The Commission has been examining a number of various proposals directed toward promoting the effective use of the Citizens Radio Service or reducing widespread Rule violations. These proposals will be the subject of further Commission inquiries and proceedings with regard to Class D enforcement problems. The immediate proceeding, however, will address only the possibility of allocating additional frequencies to meet the requirements of the general public for improved radiocommunication services not now effectively provided by the Class D Citizens Radio Service and, at the same time, relieve some of the heavy concentration of stations on channels available to the Class D service. Such stations constituted nearly 47% of the total number of radio stations authorized by the Commission, as of June 30, 1971.

9. The Commission proposes in this proceeding to establish a form of fixed and mobile service in the band 224–225 MHz. The band would be divided into 40 channels at 25 kHz spacing. Eligibility for this service would be similar to that for the present Class D service, i.e., any person eighteen years and older who meets the basic criteria for Commission licensing. However, the Commission does not intend that the abuses of its Class D rules, and associated enforcement problems, shall be extended to this new service. Accordingly, before this service is permitted to become operational the Commission will establish new Class E rules and enforcement procedures, based on the information provided in response to paragraph 10 of this Notice and such other relevant information as it deems appropriate.

10. With a view toward achieving the above objectives regarding the reallocation of the band 224–225 MHz specific comments and substantiating data are invited on the following:

a. Specific services and types of operations which should be provided, including limitations and reasons therefor. Estimated growth over 10-year period.

b. Economic, sociological and other public interest benefits which would be derived.

c. Effect on Class D Citizens Band operations at 27 MHz.

d. Nature and probable impact of operational limitations imposed as a result of interagency and international objections or conditions of use.

e. Detailed technical parameters which should be adopted regarding equipment to be used, including detailed studies of extent of effective coverage and use to be expected in different environments such as urban areas with high density population. In addition, detailed recommendations should be made regarding total spectrum space required to meet various objectives, channeling, maximum power, antenna limitations, channel capability, frequency control, etc. Additional comments on recommended receiver characteristics are also invited, as well as estimated equipment costs to the user.

f. The feasibility, cost, operational use and potential effectiveness of automatic transmission of call sign or station identification as an aid to self or Commission enforcement, or for other purposes.

g. Appropriate measures to be followed regarding initial and updated registration of Class E operations for purposes of achieving efficient channel utilization, enforcement follow-up, etc.

h. The feasibility and desirability, including estimated social and economic impact, of phasing out either personal or business use of Class D service @ 27 MHz in favor of the surviving use, in conjunction with the establishment of a new Class E service.

i. The feasibility, desirability, and legality of Commission confiscation, under certain conditions, of equipment operated illegally.

11. Any schedule for implementing the new radio service operations at 224–225 MHz will have to consider the availability to the Commission of budget allocations in order to provide for the additional administration and enforcement of rules. EIA has estimated that the proposed Class E Service could produce 10 million licensees. The Commission solicits comments on this and other estimates of total licensee impact as well as the methodology and/or calculations that support such estimates. Comments are also requested regarding possible procedures for licensing and enforcement which would minimize the administrative burdens resulting from such a large number of users.

12. In the event that a portion of the 220–225 MHz amateur band is reallocated to other services, detailed amendments to the rules governing all services involved will be developed and proposed after review of the comments received in response to this proposal. The proposed amendment of Section 2.106 (Table of Frequency Allocations) is set forth in the attached Appendix I.

13. Action herein is being taken pursuant to authority contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended.

14. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before September 20, 1973, and reply comments on or before October 22, 1973. All relevant and timely comments and reply comments will be considered before final action is taken in this proceeding. The Commission, additionally, in reaching a decision in this proceeding, may also take into account other relevant information before it.

15. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. § 2.106 [amended]

United States		Federal Communications Commission					
Band (MHz)	Allocation	Band (MHz)	Service	Class of station	Frequency (MHz)	Nature of services	
5	6	7	8	9	10	11	
*	*	*	*	*	*	*	*
220–224	G, NG. (US34)	220–224	Amateur. (NG13)	Amateur.		AMATEUR.	
224–225	G, NG. (US121)	224–225	Fixed. Mobile. (NG68) (NG69)	Base Fixed. Mobile.		FIXED. MOBILE.	
*	*	*	*	*	*	*	*

2. NG13 is amended to change the pertinent band limits from 220–225 MHz to 220–224 MHz.

3. New footnotes NG68 and NG69 are added in appropriate numerical sequence to read as follows:

NG68.—In those portions of the States of Texas and New Mexico in the area bounded on the south by parallel 31° 53′ N, on the east by longitude 105° 40′ W, on the north by parallel 33° 24′ N and on the west by longitude 106° 40′ W and in the State of Florida the counties of Gulf and Franklin and the contiguous water areas of the Gulf of Mexico extending to 30 miles off shore, the frequency band 224–225 MHz is not available for use by fixed, base and mobile stations between the hours of 0500 and 1800 local time Monday through Friday, inclusive, of each week.

NG69.—Pending the outcome of coordination with Canada and Mexico, fixed and mobile stations are not authorized to operate within ten miles of the international boundary with these countries; base stations are not authorized to operate within twenty miles of the international boundary with these countries.

4. US34 is amended to change the pertinent band limits from 220–225 MHz to 220–224 MHz.

5. A new footnote US121 is added in appropriate numerical sequence to read as follows:

US121.—The only non-Government service permitted in the band 224–225 MHz is by stations of the fixed and mobile services. These stations shall be on a secondary basis to and not cause harmful interference to the Government radiolocation service.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF TELECOMMUNICATIONS POLICY,
Washington, D.C., August 19, 1971.

HON. DEAN BURCH,
Chairman,
Federal Communications Commission,
Washington, D.C.

DEAR MR. BURCH: After reviewing Government usage of the 220–225 MHz band, I have concluded that the reallocation action proposed in your letter of July 12, 1971 is not feasible at this time.

The Department of Defense has a continuing need for spectrum in the vicinity of 200 MHz in support of radiolocation operations, many with high power, at several sites in the continental United States and aboard naval vessels. Reassessment of the matter in the 1975–1980 time frame would seem appropriate, depending on advances in technology and the nature of defense requirements at that time.

Realizing, however, the increasing interest in expansion of the Citizen's Band Service, I believe that some sharing to accommodate additional operations of this type is practicable. Subject to certain caveats, 2 MHz of the 220–225 MHz band (i.e., 223-225 MHz) could be made available on a shared basis for Citizen's Band use. Such use would, of course, have to be on a secondary basis to the radiolocation operations of the Department of Defense and Citizen's Band users would need to be cautioned of the possibility of receiving interference from such operations, particularly in coastal, North Central, and the Northwestern areas of the United States.

If the foregoing appears to the Commission to be worthy of pursuit, perhaps Messrs. Spence and Dean of our respective staffs could treat the details involved.

Sincerely,

CLAY T. WHITEHEAD,
Director.

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., March 29, 1972.

HON. DEAN BURCH,
Chairman,
Federal Communications Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: By letter of August 19, 1971, I advised that the band 223–225 MHz could, with certain limitations, be made available on a shared basis for Citizens Band use. By letter of January 12, 1972, your staff requested comments on a draft Notice of Proprosed Rule Making on this matter and asked for a review of the necessity for a geographic restriction in the Texas and New Mexico areas. I have attached a statement of the restrictions necessary for military reasons.

In view of the many non-Government interests (citizens band, radio amateurs, and business radio) vying for use of this spectrum resource, we feel that favorable consideration should be given to establishing a new radio service. For example, using the two megahertz of spectrum offered by my letter of August 19, 1971, eighty FM radio channels could be made available for a General Public Radio Service, having as its prime objective the satisfaction of many currently unfulfilled communication needs of a nation on the move—travelers, sportsmen, hobbyists, and quasi-business activities. Propagation characteristics of 225 MHz, coupled with carefully developed FCC rules, could afford a high fidelity, orderly communications service, responsive to the needs and interests of the private citizen. Additionally, estimates of the industrial activity contribution of such a service suggest a market size as large as 300 to 500 million dollars per year.

While the spectrum involved (223–225 MHz) is allocated currently to the Radio Amateur Service, in addition to Government Radiolocation, the three megahertz remaining (220–223) would seem adequate for current and likely future radio amateur operations. Radio amateurs could continue to use the 223–225 MHz band provided they complied with the rules applicable to the new radio service. Although we are greatly reluctant to reduce any frequency allocations now devoted to amateur use, we feel the large public need for this new radio service justifies this action.

In summary, there is a need for a disciplined radio service responsive to the needs of the general public and, properly handled, such a service could be provided responsive to the needs of all potential users.

We look forward to working further with you on this matter.

Sincerely,

CLAY T. WHITEHEAD, *Director.*

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS UNITED STATES AIR FORCE,
Washington, D.C.

Subject: Citizens radio service operations in the 220–225 MHz band.

To: Mr. W. DEAN, Jr.

1. Several months ago when the military departments reviewed the FCC proposal for allocating a portion of the 220–225 MHz band to CRS operations, comments were based on limited impact information immediately available. Urgency of the FCC requirement was apparent. Assistance to the FCC was necessary to the limit that current military operational needs would permit. Since first consideration of the proposal, additional investigation and study have been accomplished to determine beyond reasonable doubt what impact unrestricted CRS operations would have on military test ranges.

2. Proposed CRS operations represent a significant interference hazard to military test operations in the vicinity of WSMR, NMex and part of the Gulf test range in northwest Florida. It has been determined that unrestricted CRS operations within interference radius of these important test areas will totally impair acquisition of certain vital test data. CRS communications will result in much greater density of spectrum use much closer to instrumented test areas

than is normally experienced with amateur activities. Unless protective restrictions are imposed to prohibit CRS operations from these areas, resulting interference is expected to require expensive adjustments in instrumentation.

3. In view of CRS history of undisciplined operations, uncontrolled sharing of the frequency resource under consideration is not feasible. It is imperative that existing caveats applicable to the 220–225 MHz band be retained for CRS operations. In addition, a note similar to NG 13 must be imposed against CRS operations in Gulf and Franklin Counties, Florida and their contiguous water areas extending 30 miles into the Gulf of Mexico. This will provide minimum acceptable protection for active off shore test operations adjacent to these counties. A proposed footnote similar to NG 13 is as follows:

> NG.—In those portions of the States of Texas and New Mexico in the area bounded on the south by parallel 31°53′ N, on the east by longitude 105°40′ W, on the north by parallel 33°24′ N and on the west by longitude 106°40′ W and in the State of Florida the counties of Gulf and Franklin and the contiguous water areas of the Gulf of Mexico extending to 30 miles off shore, the frequency band 224–225 MHz is not available for use by class E citizen Radio Service stations between the hours of 0500 and 1800 local time Monday through Friday inclusive, of each week.

WILLIAM R. SELL, *Colonel,*
Chairman.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
CITIZENS FOR ABRAHAM D. BEAME, NEW YORK, N.Y.
Concerning Fairness Doctrine Re WNBC–TV, New York, N.Y.

MAY 30, 1973.

SPECIAL DELIVERY
JEROME M. KAY, Esq.,
377 Broadway,
New York, N.Y.

DEAR MR. KAY: This will refer to your complaint filed on behalf of the Citizens for Abraham D. Beame against Station WNBC–TV, New York, New York, concerning the program "Sunday" broadcast on April 29, 1973 particularly the "People in the News" segment and a May 12, 1973 news program.[1]

You state that Mr. Beame is a legally qualified candidate in the June 4, 1973 primary election for the New York City Democratic Mayoral nomination; that on the April 29, 1973 broadcast of "Sunday" referred to above, Mr. Beame's "principal rival for the nomination," Mr. Albert Blumenthal, appeared for "approximately nine minutes and forty seconds" and charged that as City Comptroller, Mr. Beame "has not solved any of the City's problems for the last twenty-four years" and has not invested the City's six billion dollars in pension funds in mortgages in the City and State of New York; and that your requests for reply time for Mr. Beame under the "Equal Time and Fairness Doctrines" were rejected by NBC on the ground that Mr. Blumenthal's appearance on the program was exempt from the "equal opportunities" provisions of Section 315 of the Communications Act of 1934, as amended. You challenge NBC's denial of your request on the ground that the exemptions set forth in Section 315 "refer to pure news programs . . . . not to feature programs, such as 'Sunday'." You also contend that contrary to the fairness doctrine, WNBC–TV's programming "has been weighted against Mr. Beame."

You further allege that NBC has acted "in what we believe is a biased manner towards Mr. Beame, with an intent to distort his positions on the issues in the current Mayoral campaign." In particular, you state that on May 12, 1973, Mr. Beame was questioned by an NBC reporter as to whether or not he planned to participate in a debate with his

[1] Material filed with the Commission in this matter includes your initial letter of complaint, dated May 12, 1973, and supplementary letter, dated May 16, enclosing a copy of a letter sent to Mr. Julian Goodman of NBC on May 15; NBC's letters of May 17, 18 and 22, in response to the Commission's oral request; your reply to NBC's response, dated May 22, and received by the Commission on May 24; and a further NBC response, dated May 29.

rivals for the Democratic Mayoral nomination to be televised by NBC on its "Sunday" program of May 13, 1973; that during the taping of that interview, Mr. Beame replied that although he was at all times ready to debate the issues with his opponents, he objected to the proposed format allowing only one and a half-minute responses to questions and also stated that he did not wish to appear on the program until NBC granted the above-cited request for equal time in reference to Mr. Blumenthal's appearance; that the reporter "pressed for a 'yes' or 'no' answer" concerning the debate and Mr. Beame responded that he would not appear; that on its 6:00 p.m. news program of May 12, WNBC–TV broadcast only that part of the taped interview which contained the question whether Mr. Beame would participate in the debate and his negative answer and omitted his prior explanation and assurances that he would debate the issues during the campaign; and that this film clip was followed by the taped remarks of one of Mr. Beame's opponents, Congressman Herman Badillo, who strongly criticized Mr. Beame's "decision not to debate the issues." You contend that NBC thereby "unfairly and unconscionably distorted the truth of the matter," implying that Mr. Beame "would not debate the issues during the campaign, a wholly untrue and unwarranted implication."

You therefore request the Commission to order NBC to recognize Mr. Beame's "right to reply" to Mr. Blumenthal's remarks on the "Sunday" program of April 29 and also to grant him "an equal opportunity to reply to and to explain the false implications concerning (his) position as to debates."

In response to Commission inquiry, NBC submits that the "People in the News" segment of the "Sunday" program is a "bona fide news interview" within the meaning of Section 315(a)(2) of the Communications Act and that therefore Mr. Blumenthal's appearance in that segment is exempt from the "equal opportunities" provisions of that section. In support of this submission, NBC states that "People in the News" is a regularly scheduled news interview; that its content, format and participants are determined by the station; and that its production reflects the exercise of the station's bona fide news judgment and is not designed to benefit any candidate. NBC further states that Mr. Blumenthal's appearance was in all respects a news interview, the interviewee being asked to respond to questions posed by the program's regular staff who determined the subjects to be covered and maintained editorial control over the program's content and format. NBC also states that "in conjunction with its on-going coverage of the New York City Mayoral election, WNBC–TV has provided coverage of Mr. Beame's candidacy through its news coverage and news interview programs, including the May 13th edition of "People in the News" segment of "Sunday."

In reply to NBC's response, you reiterate your contention that Mr. Blumenthal's appearance in the program segment in question should not be considered as within the "bona fide news interview" exemption under Section 315(a)(2) since "[t]he content and the format of the show were such that Mr. Blumenthal was permitted to clearly state and justify his record and position on the issues and attack Mr. Beame, all without any opportunity for rebuttal by Mr. Beame . . ."

Citing the fairness doctrine and the Commission's personal attack rules, you also more broadly contend that the "bona fide news interview" exemption "cannot absolve NBC from the obligation . . . to operate in the public interest and to afford reasonable opportunity for discussion of conflicting views on issues of public interest" and that "The intent of Section 315 is to afford each candidate an opportunity to respond to personal attacks and discuss controversial issues brought up by other candidates."

In essence, your complaint purports to interrelate the fairness doctrine and personal attack rules with Section 315 of the Communications Act so as to establish that a "right to reply" arose in Mr. Beame's favor as a result of his opponent's appearance on the program in question. However, it must be understood that while these regulatory provisions are somewhat related in terms of their basic underlying policy, they respectively apply to different factual situations and embody rights and obligations which are separate and distinct. Section 315 provides that if a licensee permits any person who is a legally qualified candidate for public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for the use of such broadcasting station. This statute, however, specifically exempts from its equal opportunities provision candidate appearances on bona fide newscasts, news interviews, and news documentaries, and on-the-spot coverage of bona fide news events.

Under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. In contrast to the provisions of Section 315, the fairness doctrine does not require that "equal time" be afforded each side, and no particular person or group is entitled to appear on the station since it is the right of the public to be informed which the doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue in its *overall* programming. There is no requirement that both sides be given in a single broadcast or series of broadcasts. The Commission will review complaints under the fairness doctrine only to determine whether the licensee can be said to have acted reasonably and in good faith.

The Commission's personal attack rules provide that when, during the presentation of views on a controversial issue of public importance, an attack is made upon an identified person or group, it is the duty of the licensee to notify the person or group attacked, to send a recording, transcript, or as accurate a summary as possible, and to afford an opportunity for a response. Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events are exempt from the personal attack rules. Moreover the provisions of the personal attack rules do not apply, *inter alia*, to personal attacks made by legally qualified candidates upon other such candidates.

Since your complaint, in primary part, seeks to invoke Section 315 of the Communications Act with respect to Mr. Blumenthal's appearance on the program "Sunday," the major issue presented is whether

the "People in the News" segment of that program in which Mr. Blumenthal appeared is a bona fide news interview exempt from the equal opportunities provision of that section. Your attention is directed to the enclosed copy of the Bureau's ruling to Jesse I. Levine, Esq., dated May 29, 1973. For the reasons stated therein, it has been determined that the "People in the News" segment of the program "Sunday" is a bona fide news interview to which the equal opportunities provision does not apply. Therefore, no right to equal opportunities or "equal time" arose in favor of Mr. Beame as a result of Mr. Blumenthal's appearance on the program in question.

You also appear to suggest that the fairness doctrine obligates WNBC–TV to afford Mr. Beame an opportunity to respond to Mr. Blumenthal's remarks. As noted above, however, the fairness doctrine does not entitle any particular person or group to broadcast his particular views since the doctrine is issue rather than spokesman oriented. Also, under the Commission's procedures, a fairness doctrine complainant must submit specific information indicating, *inter alia:* (1) the specific issue which was broadcast; (2) reasonable grounds for the claim that the station presented only one side of the issue in its overall programming; and (3) whether the station has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting views. You have not provided the Commission with any specific detailed information which would indicate that WNBC–TV has failed to afford a reasonable opportunity, in its overall programming, for presentation of contrasting views on any controversial issues of public importance which may have been discussed by Mr. Blumenthal on the program in question. Should you furnish such information, further consideration will be given to your complaint. In this regard, the Commission recommends that specific fairness doctrine complaints first be brought to the station's attention since it has found that many can be resolved by direct communication between the parties. If, after contacting WNBC–TV you are not satisfied that the station has fulfilled its obligations and the Commission is so advised in pertinent, factual detail, as set forth above, it will make appropriate inquiry. It should be noted, in this regard, that NBC states that "Since March 1973 Mr. Beame has appeared on WNBC–TV on more than 20 separate occasions either through news interviews or the presentation of prepared statements including one appearance on the very series in question," and that this indicates that "the station has not left the public uninformed concerning the candidacy of Abraham D. Beame."

You further appear to allege that Mr. Beame was "personally attacked" by Mr. Blumenthal in his appearance on the program in question. However, as indicated above, any attack by Mr. Blumenthal on Mr. Beame would be exempt from the personal attack rules as both are legally qualified candidates for public office. In addition, it has been determined that the "People in the News" segment of the program constitutes a bona fide news interview, and as such, it would be exempt from the personal attack rules. Insofar as the fairness doctrine may be applicable to controversial issues of public importance dis-

cussed by Mr. Blumenthal in his appearance, your attention is referred to the preceding paragraph.

With respect to your allegation that WNBC–TV intentionally distorted Mr. Beame's position on the proposed debate, the Commission can appropriately commence action in this sensitive area only upon receipt of significant extrinsic evidence of deliberate distortion as, for example, statements by individuals who have personal knowledge that a licensee ordered the news to be distorted or fabricated. Were this Commission to do otherwise and proceed simply on the basis of allegations that what was said over the air was inaccurate or untrue it would be in the position of determining the "truth" of each factual situation, evaluating the degree to which the matter complained of departed from the "truth," and, finally, calling upon the licensee to explain the deviation. The Commission believes that such a role would be inappropriate for a Government licensing agency. However, as stated, when significant extrinsic evidence of deliberate distortion is received, the Commission will make such inquiry as appears appropriate to the circumstances.

In view of the foregoing, no further action by the Commission appears to be warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D. C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
J. STANLEY SHAW, NEW YORK, N.Y.
Concerning Fairness Doctrine Re Station
WNBC–TV, New York, N.Y.

MAY 29, 1973.

SPECIAL DELIVERY
JESSE I. LEVINE, Esq.,
770 Lexington Avenue,
New York, N.Y.

DEAR MR. LEVINE: This is in reference to your complaint against WNBC–TV, New York, New York, filed on behalf of J. Stanley Shaw, concerning the program "Sunday" broadcast on May 13, 1973, with particular reference to the "People in the News" segment.[1]

You state that Mr. Shaw is a "certified candidate for mayor of New York City in the Liberal Party's primary" election to be held June 4, 1973; that on May 13 between 10:00 and 11:00 p.m. WNBC–TV broadcast the above referenced program in which four mayoral candidates were interviewed; that of the four, two are candidates only in the Democratic Party's primary, one is a candidate in both the Democratic and Conservative Parties' primaries, and the fourth (Alfred Blumenthal) is a candidate in both the Democratic and Liberal Parties' primaries; that because of Mr. Blumenthal's appearance you asked WNBC–TV to invite Mr. Shaw to appear on the program; and that this request was denied by WNBC–TV on the grounds that the program was a bona fide news interview program to which the equal opportunities provision of Section 315 of the Communications Act is not applicable. You contend that the program is not exempt from that provision; that the guests on the program answered questions posed by two members of the public affairs staff of WNBC–TV rather than by members of the news staff; that the program was an extension of the regular "Sunday" program usually broadcast on Sunday morning from 10 to 12 noon; that none of the guests on the program "dealt with any type of hard news"; that the program was actually a debate rather than an interview; and that therefore WNBC–TV failed to comply with Section 315 and the fairness doctrine.

In response to an inquiry by the Commission, WNBC–TV states that the "People in the News" segment of the "Sunday" program is a bona fide news interview program; that it is regularly scheduled; that the content, format and participants are determined by WNBC–TV

[1] Material filed with the Commission includes your initial telegram of May 14, 1973; NBC letters of May 17 and 18 in response to oral requests by the Commission; and your response to NBC's reply of May 18 received by the Commission on May 21; and a further letter from NBC of May 24, received May 25.

"in the exercise of its bona fide news judgment and not for the political advantage of any one candidate"; that the "People in the News" segment is a direct outgrowth of prior WNBC–TV news interview programs including: "Newslight," "Man In Office," "Open Circuit" and "Direct Line"; that the news interview functions of these programs were incorporated into the overall "Sunday" program as a regular segment and retitled "People in the News"; that the "Sunday" program was initiated "to utilize a 'magazine format' within which to present a number of regular program features including 'People in the News' "; that this format facilitates the presentation of "various in-depth examinations of current community issues and other topics of interest to viewers"; and that "flexibility of the magazine content is underscored by the fact that the 'People in the News' interviews on any particular Sunday can be and have been extended to any appropriate length from several minutes to one hour, and may present any number of interviewees either in a joint appearance or separately in individual segments."

WNBC–TV further states that "nothing in the legislative history of Section 315(a)(2) indicates that any regularly scheduled news interview program . . . needs to be scheduled at the same day or time or to have the same length or number of participants each week in order to qualify as a regularly scheduled program"; that the Commission has determined that licensees may "exercise their editorial judgment as to the length, scheduling, placement or format of regularly scheduled news interview programs without destroying the exemption accorded such programs by the statute (See *Telegram to Martin B. Dworkis*, 40 FCC 361 (1962); *Honorable Sam Yorty*, 35 FCC 2d 572 (1972); *Honorable Sam Yorty*, 35 FCC 2d 570 (1972); *Honorable Terry Sanford*, 35 FCC 2d 938 (1972)); and that on various occasions the predecessor programs to "People in the News" were lengthened, rescheduled, or presented multiple guests.

WNBC also states that Mr. Shaw was offered an opportunity to appear on the May 19 "People in the News" segment of "Sunday" with his opponent, Mr. Blumenthal, and that Mr. Blumenthal accepted while Mr. Shaw declined.

In response to WNBC's reply you reiterate that the program was not a bona fide news interview and was in fact a debate. In support of this latter contention you include a transcript, prepared by Mr. Shaw's staff, of questions asked by the moderators. With respect to the invitation for Mr. Shaw to appear on the April 29 program, you state that the invitation was sent by telegram; that the date of the program in the telegram was May 29, 1973, not April 29; and that by the time it became apparent that April 29 was the correct date, scheduling conflicts made it impossible for Mr. Shaw to appear.

The major question presented by your complaint is whether the "People in the News" segment of the program "Sunday" is a bona fide news interview exempt from the equal opportunities provision of Section 315. In the Commission's Public Notice of August 7, 1970, *Use of Broadcast Facilities by Candidates for Public Office*, 35 Fed.

109-043—73——2

Reg. 13048 (1970), it was stated that in deciding whether a program was in fact a bona fide news interview:

> To establish whether such a program is in fact a "bona fide" program, the following considerations, among others, may be pertinent: (1) the format, nature and content of the programs; (2) whether the format, nature or content of the program has changed since its inception and, if so, in what respects; (3) who initiates the programs; (4) who produces and controls the program; (5) when the program was initiated; (6) is the program regularly scheduled; and (7) if the program is regularly scheduled, specify the time and day of the week when it is broadcast (35 Fed. Reg. at 13050).

The Commission has held that changes in program length or time periods in and of themselves do not justify the conclusion that such programs are not regularly scheduled news interviews. *Martin B. Dworkis, supra; Sam Yorty, supra.* Thus, the question here is whether the evolving of the four bona fide news interview programs ("Newslight," "Man In Office," "Open Circuit" and "Direct Line") [2] into "People in the News" and presenting it as a segment of the "Sunday" program can be considered such a change that the program would not be an exempt news interview. We do not believe that the changes are such as to remove the exemption. The format and content of "People in the News" does not appear to differ substantially from its predecessor programs. The basic content and format appear to be those of a bona fide news interview; WNBC–TV has continued to present the program on a regularly scheduled basis; there is no evidence that it is designed for the advantage of any one candidate; and the guests are chosen and are asked questions by the members of WNBC–TV's staff in the exercise of its bona fide news judgment.

With respect to your contention that the program is prepared by the Public Affairs Department of WNBC–TV rather than the News Department, you have furnished the Commission with no information as to the relevance of any distinction between the two staffs or as to how such distinction would have a bearing on the exercise of the licensee's news judgment.

You also refer to the questions asked of the participants by the moderators as examples of why you believe the program was a debate. The questions referred to the problems facing New York and various issues involved in the mayoralty contest. Clearly these questions were asked as part of the news judgment of WNBC–TV, and we fail to see how they support your contention that the program was a debate. Moreover, you have not shown that any of the interviewees engaged in what could reasonably be called a debate. Thus, in a debate the content of the subject matter and manner of presentation is within the purview of the debaters and you have not shown that the program was not under the control of the station at all times. Also, you have not shown that the program was advertised or referred to as a debate by WNBC–TV.

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[2] See Q's and A's 7 and 11, Section III C, of the August 7, 1970 Public Notice.

As to your statement that none of the questions asked on the program dealt with "hard news," there is nothing in the legislative history of the 1959 amendments to Section 315 to indicate that only questions involving so-called "hard news" must be asked on news interview programs in order to bring them within the exemptions. In this connection it should be pointed out that news documentaries, another type of exempt program, often deal with matters which cannot be categorized as "hard news."

As to the refusal by Mr. Shaw to appear on the April 29 edition of "People in the News," an affidavit attached to WNBC–TV's May 24 letter states that such refusal was based on the fact that Mr. Shaw was contesting the legality of Mr. Blumenthal's candidacy, and therefore did not wish to appear on the same program with him pending outcome of any legal determination. Inasmuch as we have determined that the program herein is a bona fide news interview, to which the equal opportunities provision is not applicable, we need not resolve this factual conflict. In any event, you state that you believe the offer was made by WNBC–TV in good faith.

With respect to the fairness aspect of your complaint, you state that the fairness doctrine requires that "Mr. Shaw be given ample opportunity to appear on WNBC to state his views on the issues involved in the Liberal Party Primary Campaign."

Since the Commission is prohibited by statute from censoring broadcast material, it is not authorized to grant or deny air time to any particular person or group. However, under the fairness doctrine, which applies to all broadcasts of controversial issues of public importance, if a licensee presents one side of such an issue, he must afford reasonable opportunity for the presentation of contrasting views. The licensee may exercise judgment in selecting the format to be employed and the persons he believes to be responsible representatives of the various contrasting views. The Commission will review the licensee's actions only to determine whether they appear to have been reasonable and made in good faith.

The Commission will make inquiry into complaints that a licensee has failed to comply with the requirements of the fairness doctrine if it is informed of the specific controversial public issues which have been presented, the date of the presentations, and the basis for the complainant's belief that the licensee has failed to afford reasonable opportunity for the presentation of contrasting views. You have not furnished the Commission with any specific detailed information indicating that WNBC–TV in its overall programming has failed to offer reasonable opportunity for discussion about the issue about which you are concerned. Should you provide such information, further consideration will be given to your complaint. In this connection the Commission recommends that complaints in this area first be directed to the station, because it has found that many can be resolved by direct communication between the parties. If after contacting WNBC–TV you are not satisfied that the network or station has fulfilled its responsibilities, however, and the Commission is advised in detail as set forth above, it will make appropriate inquiry.

In view of the foregoing, it does not appear that any further action by the Commission is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-591

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (JACKSON, WYO.)	Docket No. 19654 RM-1899

REPORT AND ORDER

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION:

1. The Commission has before it its Notice of Proposed Rule Making adopted November 29, 1972 (37 Fed. Reg. 26135), inviting comments on a proposal by KSGT, Inc., to assign Channel 245 to Jackson, Wyoming, Jackson, a community of 2,101 persons and seat of Teton County, has a Class IV AM station (licensed to petitioner), but neither Jackson nor any other community in Teton County has an FM assignment. Channel 245 could be assigned to Jackson in conformance with the Commission's minimum mileage separation rule and without affecting other assignments in the FM Table. Interested parties were invited to comment on the Commission's proposal on or before January 12, 1973, and could reply to such comments on or before January 22, 1973. Supporting comments were filed by petitioner and by Jackson Hole FM Joint Venture. There were no oppositions to the proposal.

2. In our Notice we stated that, while a Class A channel might well satisfy some of the apparent requirements for additional service in the area, it would not be able to reach many of the areas in need of service. For this reason we were persuaded to pursue the possibility of assigning a Class C channel without at the same time proposing an alternative Class A channel. We requested interested parties to submit in their comments information as to whether there is a reasonable basis to believe that a Class C operation could be viable, and whether there is a preferable channel to assign rather than Channel 245 (the latter stemming from the fact that other channels are available and there may be a possibility that another might be more suitable than Channel 245).

3. In its supporting comments petitioner points out that it doubts whether an independent Class C FM operation would be viable in the community of Jackson. It feels that only the economies inherent in a joint AM-FM operation make feasible FM operations in the community. It contends that an FM signal would provide coverage to residential areas which do not receive its AM signal and which thereby miss important national and local news and public affairs programs not

otherwise available. Petitioner advises that more than 30 channels could be assigned to Jackson, but having considered all of them, none is superior to Channel 245.

4. Jackson Hole FM Joint Venture (Jackson Hole), in supporting comments, states that economic support for a Class C FM operation is apparent from the unusual nature of the Jackson area, for although Jackson has a relatively small year-round permanent population, it has business activity perhaps greater than any other town of such size in the nation because of its location at Grand Teton National Park. It states that the financial success of the existing AM station (KSGT) indicates that the Jackson area has ample advertising potential, for KSGT's August 1971 amended renewal application shows that in April 1971 the station revenue was $4,829 and in July 1971, $17,400. It notes further that, if July is typical of the two summer months, and April of the 10 remaining months, KSGT's annual revenue would be $83,090. It points out that, with the additional revenue which can be expected from the institution of a new FM service in Jackson, which will be able to offer advertisers much greater coverage than the present Class IV AM facilities, especially at night, the total revenue of the two stations should be well above that figure. Jackson Hole notes that a study of available FM channels which could be assigned to Jackson in compliance with mileage separation requirements indicates that there is no Class C channel available which would be more suitable than Channel 245.

5. We have given careful consideration to the proposal and comments filed, and conclude that it would be in the public interest to assign Channel 245 to Jackson, Wyoming. The channel would provide for a first FM broadcast service to Jackson and to Teton County. Since Channel 245 would have the least preclusionary impact among the channels available for assignment to this area, it would thus be the most suitable channel assignment. As to the viability of a Class C FM station, it appears that there is sufficient economic basis to support such an operation, independently or jointly with an AM station.

6. The authority for the action taken herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

7. Accordingly, IT IS ORDERED, That effective July 16, 1973, the Table of Assignments (Section 73.202(b) of the Rules) IS AMENDED with respect to the community listed below to read as follows:

City	*Channel No.*
Jackson, Wyoming	245

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–494

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (WEST ALLIS, BERLIN, HARTFORD, NEENAH-MENASHA, SHAWANO, WATERTOWN, AND WAUPUN, WIS., AND ESCANABA, MICH.; COAL CITY, DWIGHT OR MARSEILLES, ILL.; ST. CHARLES AND ST. LOUIS, MO.; MUNCIE, IND. AND CELINA, FOSTORIA, AND LIMA, OHIO; ANAMOSA AND IOWA CITY, IOWA; TERRELL AND CORSICANA, TEX.; SULLIVAN, BEDFORD, AND PAOLI, IND.; ORANGEBURG, S.C.; DANVILLE, IND.; DECATUR OR PARIS, ILL.; MANNING AND KINGSTREE, S.C.)	Docket No. 19161 RM–1476 RM–1554 RM–1489 RM–1559 RM–1523 RM–1561 RM–1524 RM–1563 RM–1528 *RM–1566* RM–1540 RM–1571 RM–1552 RM–1626 RM–1660
AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (DECATUR, ILL., RANTOUL, ILL.; SANTA ROSA, CALIF.; DULUTH AND CLOQUET, MINN.; LADYSMITH, WIS.; ENFIELD, CONN., GREENFIELD AND NORTHAMPTON, MASS.; WILLIMANTIC, CONN.)	Docket No. 19317 *RM–1686* RM–1696 RM–1693 RM–1697 RM–1866

MEMORANDUM OPINION AND ORDER

(Adopted May 9, 1973; Released May 16, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. On August 29, 1972, we adopted the *Fourth Report and Order* in *Docket No. 19161* in conjunction with the *Second Report and Order* in *Docket 19317* (FCC 72–776, released September 7, 1972) in which, *inter alia*, we amended the FM Table of Assignments by substituting FM Class B Channel 253 for FM Channel 252A at Paris, Illinois, occupied by Station WPRS–FM [1], and by assigning FM Class B Channel 236 to Decatur, Illinois for a second Class B assignment. This action was taken after consideration in rule making in *Docket No. 19161* of conflicting proposals for the assignment of Channel 253 either to Paris in place of its Channel 252A assignment or to Decatur and of an alternative proposal in *Docket No. 19317*, a subsequently instituted proceeding, for providing Decatur with a second FM assignment

[1] We also ordered modification of the outstanding license of Station WPRS–FM to specify operation on Channel 253 in lieu of Channel 252A, subject to the consent of the licensee and its submission of technical data for operation on Channel 253, which has been received.

by the assignment of Class B Channel 236 to it. The Paris Channel 253 proposal in *Docket No. 19161* was proposed by Paris Broadcasting Corporation, licensee of the Paris Channel 252A station (WPRS–FM) and also of daytime AM station (WPRS) at Paris in *RM–1566*. In instituting rule making on the Paris proposal, we also proposed to consider Decatur in the alternative for the assignment. The alternative Decatur Channel 236 proposal in *Docket No. 19317* was proposed by Stephen P. Bellinger, Joel W. Townsend, Ben H. Townsend, and Reynold Fischmann, d/b/a Prairieland Broadcasters (Prairieland), the licensee of a daytime AM station (WDZ) at Decatur, in *RM–1686*.

2. We now have before us a petition for reconsideration, filed on October 6, 1972, by Prairieland, from our action in the aforesaid Fourth Report and Order in *Docket No. 19161* assigning FM Channel 253 to Paris in lieu of Decatur. An opposing "Answer" to the Prairieland petition was filed by Paris Broadcasting Corporation on October 24, 1972.[2]

3. The Prairieland petition for reconsideration will be denied. Its whole thrust is that by assignment policy considerations Decatur warrants a third wide-coverage Class B assignment over a first Class B assignment for Paris, and that we erred in not assigning Channel 253 to Decatur for a third Class B assignment rather than to Paris in Docket No. 19161 simply because of our determination in Docket No. 19317 that Channel 236 could be assigned to Decatur.

4. Prairieland's claim of error is groundless, for there was no proposal before us in either Docket No. 19161 or Docket No. 19317 for the assignment of a third FM channel to Decatur, and no showing by Prairieland or others in support of such a proposal, or which would warrant action assigning a third Class B assignment to Decatur without prior notice of rule making and opportunity for public comment, even if the conflicting Paris Channel 253 proposal in Docket No. 19161 had not also been before us. While it may be debatable whether Paris would have been preferred to Decatur for the proposed Channel 253 assignment in Docket No. 19161 if Channel 236 had not been found to be technically suitable and warranted for a second Class B assignment at Decatur, we need not now be concerned with the question, for we so found this made it possible to provide both communities with a Class B assignment which, for the reasons given in our decisions in the Fourth Report and Order and Second Report and Order in Docket Nos. 19161 and 19317, we believe to be warranted.

5. Further, in the interest of orderly administration of the Commission's business, especially in view of the backlog of FM assignment cases, we would not ordinarily accept an alternative assignment proposal for consideration with others in an FM rule making proceeding if submitted for consideration after the proceeding is closed for public comment but prior to the issuance of a decision. We are of the view that

[2] Public Notice of the filing of the Prairieland petition for reconsideration was given on October 13, 1972, and the 10-day period prescribed by the note to Section 1.106 of the rules for filing oppositions thereto expired on October 23, 1972. While the opposing "Answer" of Paris Broadcasting was received after the due date, it is accepted since its lateness (involving only one day) has not hindered our disposition of the petition, and the petitioner has raised no objection to its acceptance.

after a decision has been reached there is even less justification for considering a new proposal advanced as a basis for reconsideration. We are not persuaded that there is any overriding public interest reason for doing so here.

6. In view of the foregoing, IT IS ORDERED, That the petition for reconsideration, filed October 6, 1972, by Prairieland Broadcasters IS DENIED, and that our Fourth Report and Order herein on the Paris-Decatur assignment proposals (RM–1566) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

41 F.C.C. 2d

F.C.C. 73–589

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ELI AND HARRY DANIELS, D.B.A. THE HEART OF THE BLACK HILLS STATIONS For Renewal of License of Station KRSD–TV Rapid City, S. Dak.	Docket No. 18358 File No. BRCT–410
ELI AND HARRY DANIELS, D.B.A. THE HEART OF THE BLACK HILLS STATIONS For Renewal of License of Station KDSJ–TV Lead, S. Dak.	Docket No. 18359 File No. BRCT–564

ORDER

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. The Commission has before it for consideration a Motion for Stay, filed May 14, 1973, by The Heart of the Black Hills Stations (Black Hills), of the effective date of the Commission's Memorandum Opinion and Order (36 FCC 2d 568) of July 26, 1973, which denied reconsideration of the Commission's Memorandum Opinion and Order (32 FCC 2d 196), released November 1, 1971, which denied the above-captioned renewal applications.

2. In our decision denying renewal of the license applications for stations KRSD–TV, channel 7, Rapid City and KDSJ–TV, channel 5, Lead, South Dakota, we provided that Blacks Hills was authorized to continue to operate both stations until thirty (30) days after final disposition of any judicial appeal. On February 26, 1973, our decision in this matter was affirmed by the United States Court of Appeals for the District of Columbia Circuit, *The Heart of the Black Hills Stations* v. *Federal Communications Commission*, Case No. 72, 1804, D.C. Circuit. Thereafter, on May 21, 1973, the Court denied Black Hills' petition for rehearing. Thus, under the terms of our July 26, 1973, decision, Black Hills is required to terminate operation of both stations on June 20, 1973. However, on May 14, 1973, Black Hills filed a Motion for Stay of Effective Date of our July 26, 1973, opinion. Blacks Hills now requests temporary authority to continue to operate stations KRSD–TV and KDSJ–TV until such time as construction permits for the channels are granted or until interim operating authority is granted.

3. In a Public Notice issued this date, the Commission has accepted for filing the applications of Dakota Broadcasting Co., Inc., for construction permits to operate on the channels presently occupied by stations KRSD–TV and KDSJ–TV. In addition, the Public Notice provides for the filing by other interested parties of applications for construction permits for either or both channels and requests, pursuant to section 1.592(b) of the rules, for joint interim operating authority for either or both channels and specifies a "cut-off" date within which such applications and requests must be substantially complete and tendered for filing.

4. The Commission believes that, because stations KRSD–TV and KDSJ–TV provide one of only two television broadcast services in the Rapid City and Lead areas, it would be in the public interest to give Black Hills temporary authority to continue to operate both stations pending further order by the Commission. This will permit the Commission to consider requests for interim operating authority in an orderly manner, and the viewing public in the Rapid City and Lead areas will continue to have a choice of television broadcast service available to it.

5. Accordingly, IT IS ORDERED, That the motion for stay filed by Eli and Harry Daniels, d/b/as The Heart of the Black Hills Stations, IS GRANTED, and that The Heart of the Blacks Hills Stations IS HEREBY GRANTED TEMPORARY AUTHORITY to continue the operation of stations KRSD–TV, Rapid City, and KDSJ–TV, Lead, South Dakota, after June 20, 1973, and until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-355

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
BROADCASTING OF INFORMATION CONCERNING
HORSE RACES

MEMORANDUM OPINION AND ORDER

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING; COMMISSIONER REID ABSENT.

1. The Commission has before it a petition filed on February 18, 1972, by the New York City Off-Track Betting Corporation (OTB), asking the Commission to reconsider its Declaratory Ruling of December 17, 1971, *In the Matter of Broadcasting of Information Concerning Horse Races*.[1] The petition asks the Commission to set aside its ruling that broadcast licensees may accept no advertising from OTB except "institutional advertising" and to rule instead that licensees may accept any OTB advertisements which do not contain timely information about particular races. For reasons stated below, we grant the Petition for Reconsideration and modify the Declaratory Ruling as to advertisements. We do not adopt the language suggested by the Petitioner, however; and we emphasize that this ruling is subject to further modification if it should appear in practical effect to benefit illegal gambling interests.

2. The limitation on advertisements was contained in a Declaratory Ruling the Commission issued in response to OTB's request for rulings on specific proposals for a promotional campaign. Among the proposals was the following:

> "(5) advertisements of OTB, including the promotion of legal off-track, pari-mutuel wagering and explanations as to how OTB's facilities may be utilized."

The Commission responded by invoking its 1964 Policy Statement on the broadcast of horse racing information.[2] The ruling on the advertising proposal was as follows:

> "Request No. 5—While OTB betting activities are legal in the State of New York, it would appear that the use of broadcast facilities to promote such legal activities would also serve to promote private and still illegal gambling in that State as well as promoting gambling activities in neighboring States where it is still illegal. The broadcast of such programs would therefore be

[1] 32 F.C.C. 2d 705.
[2] 36 F.C.C. 1571.

contrary to our 1964 Policy Statement. The extent of allowable advertising would be limited to 'institutional advertisements' i.e., in much the same manner as the racetracks currently advertise 'come to XYZ race track'."

3. The Petitioner's arguments can be summarized as follows: (1) The Commission's ruling "violates the First Amendment and precepts of due process and equal protection"; (2) OTB's advertising campaign is "crucial to its viability"; (3) advertisements promoting OTB would not aid illegal gambling, and, therefore, are not contrary to the 1964 Policy Statement; (4) even if some OTB advertisements would aid illegal gambling, the restriction to "institutional advertisements" goes beyond the 1964 Policy Statement and bars some material that would serve a legitimate public need; and (5) the Commission has not set forth "parameters" of the term "institutional advertisements," with the result that broadcasters do not fully understand their obligation under the ruling.

4. We do not find it necessary to consider the constitutional questions in view of our decision on other grounds to reconsider the ruling. We also do not discuss at length the second and third arguments, which were considered and rejected in the Commission's ruling on OTB's initial petition, on grounds that remain valid. The Commission concluded at that time that at least some advertisements promoting legalized betting "would serve to promote private and still illegal gambling. . . ." This conclusion required the Commission to reject those advertisements as contrary to the public interest, regardless of how important they might be to OTB's "viability." The difficult task for the Commission at that point was to draft a ruling that would forbid only those advertisements which, in the language of the 1964 Policy Statement, "were most likely to aid illegal gambling and which did not appear to serve a legitimate public need." [3]

5. We are persuaded by the Petitioner's fourth argument that the Commission failed to give sufficient weight to the second part of this formula (*i.e.*, service to a legitimate public need), and that the ruling does, indeed, go beyond the 1964 Policy Statement. Furthermore, as the Petitioner contends in his fifth argument, the term "institutional advertisements" lends itself to narrow construction by licensees, who may interpret it to bar advertisements that the Commission had no intention to bar.[4] The practical result of the ruling, according to the Petitioner, has been "to preclude OTB from any effective advertising on radio or television. . . ." These considerations are the basis for our decision to grant the Petition for Reconsideration and to revise the ruling on advertisements.

[3] 36 F.C.C. 1573.

[4] The National Association of Broadcasters, however, apparently believes that its members understand the term "institutional advertising." The NAB has imposed a similar restriction on radio advertising for legalized gambling through its Radio Code, which limits subscribing stations to "institutional type advertising which does not exhort the public to bet." Radio Code, 17th Edition, April 1972, at 13. The Radio Code provision was based on the language of the Declaratory Ruling now under attack. The NAB has gone even farther in restricting OTB ads on television. Its Television Board of Directors has ruled that subscribing stations may not carry any OTB advertisements at all. Subscription to the NAB codes is voluntary, however, and the restrictions they impose do not arise from governmental authority.

6. The Commission's 1964 Policy Statement grew out of a rule making proceeding that was intended to formulate regulations governing the broadcast of horse racing information. The Commission said in its Notice of Proposed Rule Making [5] that its primary purpose was to assure that broadcast stations were not used in such a way as to assist illegal gambling activities. An important secondary purpose was to eliminate "uncertainty concerning the Commission's policies in this area. . . ." With this second purpose in mind, the Commission drafted the proposed rules "in the most specific possible terms."

7. At the end of the rule making proceeding, however, the Commission decided that it could not adopt specific rules "with the assurance that they would not impede the legitimate broadcast of racing news and information." [6] The Commission instead issued a Policy Statement in general terms directed against practices which would give aid to illegal gambling. The statement provided guidance; but it left the licensees with broad discretion, concluding that "what is called for is a good-faith, commonsense judgment on the particular facts." [7]

8. Before the Off-Track Betting Corporation went into business in 1971, its officials envisioned a massive promotion campaign that would include the use of radio and television. Mindful of the problems legalized lotteries in several states had encountered in attempting to use broadcast promotional schemes,[8] OTB asked the Commission for a declaratory ruling that certain broadcast activities were permissible. The Commission's response, which included the advertising ruling that is the subject of this petition, was an attempt to apply the principles of the 1964 Policy Statement to a situation that did not exist when that statement was adopted—legalized off-track betting in New York.[9]

9. After conferring with the Justice Department—as it had done in cases of this kind since before issuance of the 1964 statement—the Commission settled on the ruling that limited OTB commercials to "institutional advertisements." Recognizing that illegal gambling interests might benefit from an advertising campaign designed to encourage people to bet on the horses, the Commission sought to impose the minimum restrictions necessary to implement the Government policy of denying communications facilities to those illegal interests.[10] The Commission did not want to impede the flow of legitimate information or to frustrate New York's legislative decision to establish off-track betting. The Commission concluded that institutional advertisements—

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[5] *In the Matter of Amendment to Part 3 of the Commission's Rules to Regulate the Broadcast of Horse Racing Information*, Notice of Proposed Rule Making, FCC 63-342, Docket No. 15040.

[6] 36 F.C.C. 1574.

[7] Id., 1575.

[8] *See, e.g., New York State Broadcasters Assn.* v. *U.S.*, 414 F. 2d 990 (2d Cir. 1969); *In the Matter of Jersey Cape Broadcasting Corp.*, Declaratory Ruling, 30 F.C.C. 2d 794 (1971). (The lottery cases arose under a statute, 18 U.S.C. 1304, which prohibits the broadcast of lottery information. The Commission's authority with regard to broadcast of gambling information, by contrast, derives from its statutory mandate to regulate broadcast licensees in the public interest.)

[9] Nevada had legalized off-track betting before 1964, but the statement did not address itself to that unique situation.

[10] A criminal statute (75 Stat. 491, 18 U.S.C. 1084) forbids the use of interstate wire communications to transmit illegal wagering information. Congress did not make the statute applicable to radio and television because the Judiciary Committees had concluded that this Commission already had adequate authority to deal with that administratively. See Senate Report No. 588, 87th Cong., 1st Sess. (1961); House Report No. 967, 87th Cong., 1st Sess. (1961).

designed to improve the image of the advertiser or the climate in which he operates, but not to influence consumers to buy a specific product or service—were a sound basis for compromise.

10. On reconsideration, we conclude that the December 17 ruling on advertising has the potential of impeding the broadcast of legitimate information about the services OTB provides and general information about the sport of horse racing. While we remain convinced that virtually any inducement to bet may cater generally to the gambling spirit, we conclude now that our ruling paid insufficient attention to New York's legislative determination that legal off-track betting would serve public needs.

11. The 1964 Policy Statement clearly was directed against broadcasts which would aid illegal off-track gambling *and* which would not serve legitimate public needs as determined by local governments. Thus, the statement recognized the "considerable significance" of the revenues that many States derive from parimutuel betting and disclaimed any intention "to inhibit the broadcasting of appropriate news, publicity, and advertising concerning horseracing." [11] The statement did not advert to legalized off-track betting, but its principles were articulated broadly enough to provide guidance.

12. When the New York legislature approved off-track betting, it determined that two public needs would be served: the raising of revenues and the suppression of illegal gambling.[12] The legislature thus gave that activity a status similar to legalized on-track betting. We see no reason to revise our 1964 Policy Statement; however, we also are not in a position to go behind the legislature's judgment that off-track betting serves legitimate public needs in New York State. To accommodate both our established policy and the State's policy, we now conclude that appropriate advertisements in support of OTB should not be prohibited. We are, therefore, adopting a different response to OTB's inquiry.

13. The revised ruling forbids advertising which directly aids or encourages illegal gambling. It permits advertisements which only induce people to follow the State's legalized betting course. To insure that broadcasters remain on guard against material which can substantially benefit illegal gambling, the revised ruling requires commercials promoting OTB to be consistent with the State's avowed aim suppressing illegal gambling.[13] We reaffirm also the responsibility of licensees to make the difficult judgments on whether to accept particular commercials for broadcast. As we said in the 1964 Policy Statement, "[W]e wish to stress that we expect licensees to make a bona fide effort to carry out their responsibilities to serve the public interest, and to avoid giving assistance to illegal gambling interests." [14]

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[11] 36 F.C.C. 1573.
[12] Unconsolidated Laws, Section 8–36(1), McKinney Supplement.
[13] This does not mean that each OTB commercial must contain an attack on illegal gambling. It does require broadcast licensees to insure that OTB commercials do not focus on revenue raising to the extent of encouraging gambling for the sake of gambling—legal or otherwise. This requirement both implements the Commission's policy in this area and reinforces the stated objectives of New York's off-track betting operation.
[14] 36 F.C.C. 1575.

14. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by the Off-Track Betting Corporation IS GRANTED.

IT IS FURTHER ORDERED, That the Declaratory Ruling of December 17, 1971, In the Matter of Broadcasting of Information Concerning Horse Racing, is revised so that the Commission's response to Request No. 5 reads as follows:

> "Request No. 5—To be acceptable under the Commission's 1964 Policy Statement, advertisements promoting OTB may not directly aid or encourage illegal gambling. Broadcast licensees should avoid giving assistance to illegal gambling interests in advertising as well as in other programming contexts. The race information suggested for presentation in Request No. 2, for example, and rejected in our response to that request,[15] would be equally unacceptable in an advertisement. At the same time, licensees should serve the legitimate needs and interests of their communities. Where the State has established a betting operation for the purpose of raising revenues and combatting illegal gambling—as New York has done—licensees may broadcast appropriate advertisements to promote that operation. "Appropriate advertisements" would include those which encourage people to patronize the State-operated off-track organization and which explain how to use OTB's facilities. We require, however, that these advertisements be consistent with both purposes of New York's program of legalized betting; the raising of revenues and the suppression of illegal gambling. In summary, the licensee's duty, in the language of the 1964 Policy Statement, is twofold: "to serve the legitimate needs and interests of his area, and to avoid giving aid to illegal gambling." [16]

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[15] The second proposal in OTB's request for a declaratory ruling was as follows:
"(2) OTB produced race information programs, which would include some or all of the following: the results of all races (in and/or out of State) as to which OTB has accepted pari-mutuel wagers from City or State of New York bettors; the pari-mutuel prices paid on all such races; scratches, post time changes, weights, jockeys, odds, and track conditions as they concern future races. . . ."
The Commission's ruling on that proposal was as follows:
"Request No. 2—The request is clearly inconsistent with the Commission's 1964 Policy Statement, and we rule against it for our licensees."

[16] 36 F.C.C. 1575.

F.C.C. 73-574

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION TO AMEND PART 89 OF THE RULES TO PERMIT THE INSTALLATION OF MOBILE UNITS LICENSED IN THE LOCAL GOVERNMENT SERVICE IN VEHICLES NOT OPERATED BY THE LICENSEE	Docket No. 19672 RM-1547

REPORT AND ORDER

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On January 29, 1973, the Commission issued a Notice of Proposed Rule Making in the above-entitled matter, which was published into the Federal Register of February 5, 1973, (38 FR 3338). Comments were filed by the Associated Public-Safety Communications Officers, Inc., (APCO), the Department of Health, Education and Welfare (HEW), the California Ambulance Association (CAA), city of Palo Alto, Northern California Chapter of the Associated Public-Safety Communications Officers, Inc., (NCAPCO) and the States of Colorado and California.

2. The Commission proposed amending Part 89 of its Rules relating to the permissible scope of non-licensee use of radio facilities authorized in the Local Government Radio Service. As stated in the Notice of Proposed Rule Making, this would permit a licensee in the Local Government Radio Service, in certain situations, to install mobile communication units in emergency vehicles (such as ambulances) not operated by the licensee, as well as in non-emergency vehicles of contractors who are performing, under contract, governmental functions which the licensee might otherwise perform for itself. In proposing this rule amendment, the Commission pointed out that a similar need has already been noted and provided for in the Police, Fire, Highway Maintenance, and Forestry Conservation Radio Services.

3. The commenting parties fully supported the proposal contained in the Notice of Proposed Rule Making, and on the basis of the record in this proceeding, we conclude that the public interest would be served by adopting the rule amendments as originally proposed.

109-043—73——3

4. Accordingly, IT IS ORDERED, That effective July 16, 1973, Part 89 of the Commission's Rules IS AMENDED, as set forth in the attached Appendix. Authority for the adoption of the Rule amendment is contained in Section 4 (i) and 303 (r) of the Communications Act of 1934, as amended.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 89 of the Commission's Rules is amended as follows:

In Section 89.257, paragraph (a) is added to read:

§ 89.257 Station limitations.

(a) Subject to the provisions of Section 89.157, communication units of a licensed Local Government Radio Service mobile station may be installed in any vehicle which in an emergency would require cooperation and coordination with the licensee, and in any vehicle used in the performance, under contract, of an official local government activity of the licensee. This provision includes ambulances, emergency units of public utilities, life guard emergency units, and vehicles of contractors or other persons or agencies performing for the licensee under contract one or more of its Local Government functions. This provision does not permit the installation of radio units in non-emergency vehicles not performing governmental functions under contract but with which licensee might wish to communicate.

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F.C.C. 73–573

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
MEDIA ACCESS PROJECT
Request for Opportunity To Inspect and Copy Tape Recording of Radio Programs Used in Connection With Inquiry Into Alleged Obscene, Indecent or Profane Broadcasts

MEMORANDUM OPINION AND ORDER

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; REID AND WILEY DISSENTING; COMMISSIONER JOHNSON CONCURRING AND STATING: "I WOULD HAVE INCLUDED THE CALL LETTERS AND STAFF COMMENTS."

1. The Commission has before it a request by Media Access Project, on behalf of the monthly journalism review (*MORE*), for an opportunity to inspect and copy a tape recording of radio programs which members of the Commission heard prior to adoption of an order instituting an inquiry into possible unlawful broadcasts of obscene, indecent or profane material. Media Access Project asked for a ruling on its request by the full Commission to avoid delay in the event judicial review were necessary.[1] For reasons stated below, we grant the request subject to the condition that staff comments and material identifying the stations[2] be deleted from the tape before inspection or copying.

2. Media Access Project (MAP) requests access to a tape recording totaling about 33 minutes playing time which was heard by the Commission on March 21, 1973. By order released March 27, 1973, the Commission initiated an Inquiry into alleged broadcasts and cablecasts of obscene, indecent or profane material (FCC 73–331, Docket No. 19716). In support of its request, MAP states that "it is essential that the public and broadcasters alike know the basis of the Commission's action" in light of the "controversy regarding sex related programming . . ."

[1] Requests for access to records that are not routinely available for inspection normally are acted upon by the Executive Director pursuant to procedures outlined in Section 0.461 of the Rules, 47 C.F.R. § 0.461. However, judicial review of the Executive Director's action could not be sought without first obtaining Commission review of his action. 47 U.S.C. § 155(d)(7).

[2] Material identifying Station WGLD–FM, Oak Park, Ill., will not be deleted because the Commission has taken administrative action against its licensee on the basis of program material which includes that contained in the tape plus additional material broadcast by WGLD–FM and quoted verbatim in the Notice of Apparent Liability. *Sonderling Broadcasting Corporation*, FCC 73–401, April 11, 1973.

I. BACKGROUND

3. Section 1464 of the Criminal Code, 18 U.S.C. § 1464, prohibits the utterance of obscene, indecent or profane language by means of radio. This statute, which originated as part of Section 326 of the Communications Act of 1934, is enforced concurrently by the Commission and the Justice Department. Cf. *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1943). In addition to the criminal penalties provided in Section 1464, violation of the statute may result in administrative sanctions for Commission licensees. Thus, Congress has empowered the Commission to revoke a license, 47 U.S.C. § 312(a), or to issue a cease and desist order, 47 U.S.C. § 312(b), or a forfeiture, 47 U.S.C. § 503(b)(1)(E), for violation of Section 1464.

4. Although numerous complaints alleging violations of Section 1464 by broadcast licensees have come to the Commission, staff investigations usually have not turned up evidence which would warrant either administrative sanctions or criminal prosecution. *Compare Pacifica Foundation*, 36 FCC 147 (1964), with *WUHY-FM*, 24 FCC 2d 408 (1970).

5. In the face of mounting complaints in recent months,[3] however, many of them directed at a radio broadcast format known in the trade press as "topless radio," the Commission's Complaints and Compliance Division in January and February 1973 asked the Field Engineering Bureau to tape some programs in a number of cities in which the incidence of complaints was high. The Bureau was instructed to tape programs which had generated the most citizen complaints to local Commission field offices. These tapes along with several others volunteered to the Commission by complainants provided the staff with approximately 61 hours of recorded programs from eight stations around the country.

6. Attorneys in the Complaints and Compliance Division reduced the 61 hours into a tape of about 22 minutes playing time. It is important to bear in mind the nature of the tape. Some of the material on it reflects a staff judgment that a substantial issue existed as to whether Section 1464 was violated. Other material on the tape, in the staff's opinion, raised questions as to possible but unlikely violations. Still other material was included because it had engendered considerable complaint, even though the staff believed there was no question of violation of the statute. In short, the tape was a distillation for the Commission of what the staff considered to be of greatest interest in this area.

7. The staff on March 21 played the tape for the Commissioners,[4] along with an 11 minute segment which included an on-the-air conversation between a sex-talk show master of ceremonies and a woman who

[3] The complaints came from the public, from broadcast licensees and from Members of Congress who themselves had received numerous complaints from constituents. The Commission has received vigorous criticism in recent months for its performance in enforcing Section 1464. Oversight hearings on the Office of Telecommunications Policy, before the Senate Commerce Subcommittee on Communications, Feb. 20, 1973; FCC oversight hearings before the same subcommittee, Feb. 22, 1973; hearings before the House Appropriations Subcommittee on HUD-Space-Science-Veterans, March 14, 1973; hearings on renewal policy before the House Commerce Subcommittee on Communications and Power, March 14, 1973.

[4] Commissioner Johnson declined to listen to the tapes for reasons stated in his dissenting opinion in *Sonderling*.

had called in to complain about the program. There followed several discussions during which the staff made its recommendations as to which material was in violation of Section 1464, and the Commission issued instructions to the staff to prepare a Notice of Apparent Liability for violation of Section 1464 against one of the licensees involved in the tape—Sonderling Broadcasting Corporation, licensee of WGLD–FM, Oak Park, Ill. On April 11, 1973, the Notice was issued. *Sonderling Broadcasting Corp., supra.*

8. On March 27, the Commission released its Order directing initiation of an Inquiry, pursuant to Section 403 of the Communications Act, 47 U.S.C. § 403, to determine whether licensees or cable operators are violating Section 1464 or related Commission rules, and, if so, to what extent. The Inquiry was ordered to be nonpublic,[5] and the Commission's subpoena powers were delegated to the Chief Administrative Law Judge to permit him to compel testimony and the production of records in the Inquiry.

II. MAP REQUEST

9. MAP's request for access to the tape invokes provisions of the Public Information Section of the Administrative Procedure Act, 5 U.S.C. § 552, commonly known as the Freedom of Information Act. In relevant part, the Act requires agencies to make most of their records available for public inspection and copying. Specifically exempted from mandatory disclosure, however, are nine categories of records, including "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5), and "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency," 5 U.S.C. § 552(b)(7). We believe that the tape requested by MAP is exempt from mandatory disclosure under both the internal memorandum and the investigatory files provisions.

10. *Internal Memorandums.* The purpose of Exemption (5) is to avoid inhibiting internal communication within government by disclosure of inter-agency or intra-agency documents that are part of the deliberative or policy-making process. See *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973); see generally *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, 1967. The Senate report on the Act articulated the policy behind the exemption this way:

> "It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The Committee is convinced of the merits of this general proposition, but it has

[5] See letter to Rep. John E. Moss, D-Calif., FCC 73–360, adopted March 29, 1973. See also *FCC* v. *Schreiber*, 381 U.S. 279 (1965).

attempted to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, 89th Cong., 1st Sess. at 9 (1965).

11. The tape recording in this case is not merely a faithful reproduction of material that was broadcast; it is in effect an aural memorandum from the staff to the Commission in the context of a deliberative or policy-making process. The content of the tape reflects certain staff judgments, and, by implication, suggestions by the staff that certain material may warrant a close look by the Commission. We conclude, therefore, that Exemption (5) permits withholding of the tape as an internal memorandum in connection with a deliberation or policy-making process.

12. *Investigatory files:* The tape also is part of an investigatory file compiled for law enforcement purposes and thus may be withheld under Exemption (7). It is clear that the primary purpose of Exemption (7) is to prevent premature disclosure of the government's case when engaged in law enforcement activities. *Cooney* v. *Sun Shipbuilding & Drydock Company*, 288 F. Supp. 708 (E.D. Pa. 1968); *Wellford* v. *Hardin*, 444 F. 2d 21 (4th Cir. 1971); *Bristol-Myers Company* v. *Federal Trade Commission*, 424 F. 2d 935 (D.C. Cir. 1971); *Frankel* v. *Securities & Exchange Commission*, 460 F. 2d 813 (2d Cir. 1972). The Commission is currently conducting an investigation both as part of a general Inquiry into obscene, indecent or profane program material, and as to possible specific violations by Commission licensees. The tape in this case is a record of "information gathering steps" in that investigation, *Wellford* v. *Hardin*, *supra*, and is properly within Exemption (7) at this time.

13. Our decision on requests for access to records does not end, however, when it is determined that an exemption in the Act is applicable. The exemptions do not *require* agencies to withhold records; they merely describe categories of records which the agencies *may* withhold. Thus, the Commission's Rules provide a procedure whereby requests for materials which fall within the exemptions may be considered. 47 C.F.R. § 0.461. In its consideration of such requests, the Commission weighs the pros and cons of disclosure in the light of the facts presented, and makes a public interest judgment on whether to release the records in spite of the exemption.

14. The question whether to make the tape available in this case in spite of the exemptions is a difficult one. On the one hand, because of its unusual nature, we believe the release of this tape would be of little or no value to the public. On the other hand, we can conceive of no adverse effect that would attend its release to the public. Contrary to the assertions made in MAP's request, the tape was not the basis for the Commission's initiation of the Inquiry. Indeed, because the Commission had been made well aware of mounting concern about allegedly obscene program material,[6] the March 27 Notice would have issued even if the tape had never been compiled and played. Release

[6] See footnote 3, *supra*. We point out that the Inquiry embraces television and cable program material as well as radio, whereas the tape concerns only a handful of radio stations.

of the tape, then, would not inform the public and broadcasters of "the basis of the Commission's action" in ordering the Section 403 Inquiry. Moreover, we fail to see any useful purpose to which the party requesting the tape may turn it.

15. However, so long as it is understood that the tape is not regarded as reflecting a Commission judgment as to what is proper or improper under Section 1464 [7]—which it emphatically does not reflect—its release can do no harm. Although the very process of compiling and editing the material for this internal aural memorandum necessarily involved some staff judgments, we do not believe they are the kinds of judgments that need to be protected from disclosure in order to insure full and frank internal exchanges of ideas. Moreover, although the Inquiry remains open and investigations into individual complaints will continue, it is not necessary to withhold this tape as an investigative file in order to avoid compromising investigative sources and techniques. Our only reservations are that the tape must not identify the stations against whom administrative action has not been taken, so that they will not be embarrassed needlessly and unfairly, and that all staff comments must be deleted.

III. CONCLUSION

16. On balance, therefore, we have decided to release the tape in the unusual circumstances of this case, subject only to the condition that staff comments and station call letters be deleted before inspection or copying is permitted. Since we already have acted against the licensee of Station WGLD–FM and have quoted extensively from the tape in our Notice of Apparent Liability directed against the WGLD–FM licensee, we do not find it necessary to delete the identification references to that station. We believe this action is consistent with sound administrative practice and with the spirit of the Freedom of Information Act, in that it permits access to records which might legally be withheld, on grounds that no harm would result from release in the circumstances of this case.

Accordingly, IT IS ORDERED, That the request of Media Access Project for an opportunity to inspect and copy the tape recording of radio program material which members of the Commission heard on March 21, 1973, IS GRANTED, subject to the conditions set forth in Paragraph 16 above. This Order embraces both the 22 minute compilation of materials boiled down from longer tapes, and the 11 minute tape which included a conversation between a WGLD–FM announcer and a woman complaining about his program. Arrangements for inspection and copying may be made through the Executive Director.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[7] The Commission's judgments and policies in this sensitive area are articulated solely through its formal actions imposing sanctions on individual licensees or cable operators, or setting forth rules or policies which are subject to judicial review. We emphasize this obvious point lest the release of this tape be misinterpreted as an oblique statement of policy or warning.

F.C.C. 73-579

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of MICROBAND CORP. OF AMERICA For a Construction Permit in the Multipoint Distribution Service for a New Station in New York City. RUST CRAFT BROADCASTING CO. For a Construction Permit in the Multipoint Distribution Service for a New Station in Newark, N.J.	File No. 5031-C5-P-71

MEMORANDUM OPINION AND ORDER

(Adopted May 31, 1973; Released June 4, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it the above captioned applications of Microband Corporation of America (Microband) filed on March 15, 1971, and of Rust Craft Broadcasting Co. (Rust Craft), filed on September 12, 1972. Simultaneously with its application Rust Craft filed a petition for "waiver and other relief." This petition was opposed by Microband.

2. In its application, Microband proposes the construction of a multipoint distribution station in New York City, with the transmitter and an omnidirectional antenna located at the Empire State Building. Rust Craft proposes the construction of its station in Newark, about 9.5 miles west of Microband's transmitter site, using a single antenna with a broadly directional pattern oriented away from New York City. Rust Craft, in its petition, requested that a grant of the Microband application be conditioned upon the installation of four directional antennas with the transmitted signal being highly suppressed in the direction of Newark. Rust Craft contended that this would eliminate interference with its proposed Newark station and on December 12, 1972, it supplemented the petition in an attempt to demonstrate the technical feasibility of this proposal. Microband opposed the Rust Craft request, citing, among other things, that interference would not be eliminated and that a significant "white area" of no service would be encountered in the New York metropolitan area in the direction of Newark. On February 14, 1973, the Chief of the Common Carrier Bureau returned the Rust Craft application as unacceptable for filing due to the likelihood of frequency interference

with the proposed New York station.[1] On February 16, 1973 Rust Craft asked for reconsideration and refiled its application. On March 13, 1973, Rust Craft asked for oral argument due to the novelty of the issues presented.

3. In requesting reconsideration Rust Craft modified its technical proposal for Microband to include an array of 16 directional antennas mounted around the periphery of the ice shield on the Empire State Building, with the radiation toward Newark severely suppressed. It also submitted additional engineering details but failed to calculate interference contours. Microband also strongly opposed this revised plan on the basis of likely co-channel interference, the compounding of the "white area" problem (as compared to Rust Craft's previous proposal), and the technical difficulties in constructing such a transmission system and its substantially higher costs.

4. Aside from technical considerations, Rust Craft contends that a grant of the Microband application for New York City with omnidirectional operation would violate Section 307(b) of the Communications Act, which requires a fair distribution of radio service among the several states. Rust Craft argues that the grant of Microband's application would not be "fair, efficient, and equitable" as between the States of New Jersey and New York, since New York will have an MDS station and the proposed New Jersey station would be precluded by radio interference if a New York station is constructed pursuant to Microband's application.

5. We agree with the general objective of Rust Craft's request. In our *Notice of Proposed Rule Making* in Docket No. 19493 (34 FCC 2d 719) we indicated that "exceptional efforts must be made to avoid possible harmful interference to other users and to avoid blocking potential use of the band in other cities." Therefore, as a general proposition applicants should make every reasonable effort to accommodate co-channel use in nearby cities. But we believe it incumbent on an applicant seeking a major modification in the proposal of another to show that the modification would be effective in the alleviation of harmful interference and that it is a reasonable one which would serve the public interest.

6. However, we are of the opinion that Rust Craft has failed on both counts. It has not shown that its proposal is technically feasible, nor do we believe that it is reasonable. If Microband modified its proposal to conform to Rust Craft's request, it would be required to install a complex array of antennas which would be expensive to install and operate. Rust Craft has not shown to our reasonable satisfaction that harmful interference with the proposed Newark station would thereby be eliminated or minimized. Moreover, the proposal of Rust Craft would appear to result in an area of substantial population between Newark and New York City that would not be able to receive adequate service from either of the proposed operations. In fact, it appears that the Newark-Elizabeth-Jersey City area as a whole would be better

[1] Since the Rust Craft application was filed long after the cut-off period for filing mutually exclusive applications pursuant to Rule Section 21.30(b), it had no right to comparative consideration with the Microband New York application.

served through a station located in New York City than through a severely restricted station located in Newark.

7. Therefore, on the basis of the information before us in this case, we cannot conclude that the Rust Craft request would serve the public interest. Also, it appears that its application would be mutually exclusive with Microband's application because of electrical interference. Accordingly, Rust Craft's petition will be denied and its application returned as unacceptable for filing for failure to file within the time prescribed by the cut-off rule. Under the circumstances of this case, we do not believe that oral argument would be helpful. Therefore, Rust Craft's request for oral argument will also be denied.

8. With regard to Microband's application we find that the proposed facilities would serve the public interest, convenience and necessity and that Microband is technically, financially and otherwise qualified to construct and operate them.

9. Accordingly, IT IS HEREBY ORDERED, That the petition of Rust Craft IS DENIED, and that the above captioned application of Rust Craft BE RETURNED as unacceptable for filing pursuant to Section 21.28(d) of the Commission's Rules.

10. IT IS FURTHER ORDERED, That Rust Craft's request for oral argument IS DENIED.

11. IT IS FURTHER ORDERED, That the captioned application of Microband IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-596

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaints of
NATIONAL WELFARE RIGHTS ORGANIZATION,
against
GILMORE BROADCASTING CORP., LICENSEE OF STATION WSVA-TV, HARRISONBURG, VA.;
AMERICAN ACADEMY OF PEDIATRICS,
and
CIBA PHARMACEUTICAL CO.

MEMORANDUM OPINION AND ORDER

(Adopted May 31, 1973; Released June 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING AND ISSUING A STATEMENT.

1. The Commission has before it a complaint filed by the National Welfare Rights Organization (NWRO) against Gilmore Broadcasting Corporation (Gilmore), licensee of Station WSVA-TV, Harrisonburg, Virginia; the American Academy of Pediatrics (AAP), and the Ciba Pharmaceutical Company (Ciba)[1], and responses filed by Gilmore and AAP. A reply to the responses was filed by the complainant.

2. The National Welfare Rights Organization states that it is a voluntary association in 50 states organized to represent the interests of low-income persons and particularly welfare recipients, and that as complainant in this case it represents the interests of its members who are parents of school-aged children and are concerned about drug abuse. The complaint alleges that required sponsorship identification was omitted from a public service announcement. The announcement was distributed under the aegis of the American Academy of Pediatrics, which states it is a non-profit corporation consisting of 10,000 certified pediatricians. Production of the announcement was financed by the Ciba Pharmaceutical Company. National Television News (NTN) produced the filmed announcement for AAP. It was sent to some 500 TV stations and apparently was broadcast by many, one of which was WSVA-TV, Harrisonburg, Virginia.[2] The film was

[1] The Commission's regulatory authority does not, of course, extend to AAP and Ciba, but as will be noted hereinafter, their actions are related to the complainant's allegations of violations of Section 508 of the Communications Act.

[2] Originally, NWRO also complained against WTAR-TV, Norfolk, Virginia, but withdrew its complaint against that station upon notification by the licensee that WTAR-TV never broadcast the announcement.

shown on WSVA–TV seven times between mid-December 1971 and mid-February 1972.

3. The film dealt with the subject of hyperactivity in children, and advocated "Sensitive care, remedial education, and in some cases the use of medication" to alleviate this condition. The announcement consisted of a one-minute color film and depicted a child, first bouncing on a bed and playing with toys and then becoming destructive. In the second sequence the child was shown in a classroom, unable to pay attention and disrupting the activities of other students. The narration was as follows:

> Everyone should unwind once in a while . . . but six-year-old Joey can't unwind. He's driven by an insatiable desire to be constantly moving. He can't focus his attention on a single subject for long. As a result, his attempts at normal play usually end in frustration. In school, Joey's inability to concentrate makes is difficult for him to learn . . . and his restless behavior disrupts the activities of the other children. Joey is just one of an estimated two million youngsters who suffer from hyperactivity. Early recognition can lead to effective management of this condition. Sensitive care, remedial education, and in some cases the use of medication, can help most of these children avoid serious emotional or behavior problems. All healthy children are active . . . but if your child shows symptoms of hyperactivity, consult your doctor.

The announcement ended with the statement that it was "presented as a public service announcement by the American Academy of Pediatrics."

4. Ciba is the producer of the drug Ritalin, which is frequently prescribed for the treatment of hyperactivity. In December 1970 Ciba received a letter from AAP asking if it would help to fund a series of TV announcements designed to educate the public on child health problems. The films were to be produced by NTN. In February 1971 Ciba received a letter from NTN outlining different lengths and types of announcements that could be produced and stating the production cost of each. Ciba then suggested the subject of hyperactivity for the announcement it would fund, and AAP accepted the suggestion. At the request of NTN, Ciba also provided research material on the subject of hyperactivity. NTN prepared a proposed script which included the reference to medication that appeared in the final version, and sent it to Ciba for review. Ciba made one suggestion of substance, not regarding medication but rather, the addition of "remedial education" as one method of alleviating hyperactivity. The AAP Committees on Public Information and on School Health and the Executive Director of AAP then reviewed the script and approved it. Ciba saw the film in rough form, but made no further suggestions. Ciba sent AAP the required sum to pay for the actual cost of production of the film. AAP, Ciba and NTN all deny that there were any agreements or understandings between Ciba and either AAP or NTN concerning any mention of treatment by means of medication. Ciba had financed no public service announcements prior to this one.

5. WSVA–TV received the script and the film on an unsolicited basis from NTN, which distributed them for AAP. Mrs. Diane Plum, Public Service and Promotion Co-ordinator for the station, pre-viewed the film to assure that it contained no commercial content. WSVA–TV

states that in its opinion "the message, if subjected to a reasonable interpretation, is nothing more than a bona fide and public spirited attempt to acquaint parents with the general problem of hyperactivity in children." WSVA–TV was not informed that Ciba had funded the announcement, and it was unaware of the details of production, other than it had been produced by NTN on behalf of AAP.

SUMMARY OF PLEADINGS

6. NWRO asserts that the AAP identification in the announcement does not adequately inform the public of Ciba's involvement and interest in the film; that the broadcast of the announcement violates Sections 317 and 508 of the Communications Act of 1934, as amended, which relate to disclosure of payment for the broadcast of matter, and that WSVA–TV is therefore subject to sanctions by the Commission. NWRO contends that because Ciba financed the production of the announcement, it should have been identified as the sponsor pursuant to the Commission's sponsorship identification requirements, and that AAP violated Sections 508(b) and (c) in failing to disclose to WSVA information as to consideration paid for the "inclusion of any matter as a part or all of the announcement" because Ciba's financing constituted such consideration.

7. AAP and NTN, in a joint response, assert that there was no violation of Section 317 or 508; that Ciba paid no money or other consideration for the inclusion of any matter in the program because there was no understanding with Ciba concerning any mention of treatment with drugs or any other part of the content of the announcement and because the committees of AAP and its Executive Director were solely responsible for control of content and for review and final approval of the announcement. AAP and NTN further state that neither was paid any money beyond the actual cost of production, neither received any service or property, and that the word "medication" as used in the announcement was reasonably related to the legitimate educational use of the film. They maintain that the examples set forth in *Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963) indicate no Congressional intent to require disclosure in a situation such as that presented here, and that examples where no disclosure is stated to be required include those of business enterprises which have assisted in the production of a program by providing recordings, film material or other services but where no additional payment has been made to the broadcast station or program producer for inclusion of the material or for any reference to the business enterprise or its products beyond what is "reasonably related to the use of such service or property" in the program. AAP and NTN also cite Sections 317(a)(1) and 508(f) of the Act in support of their position.

8. In this regard Gilmore (WSVA–TV) argues that the requirement of an announcement under Section 508 does not apply to those who, like Ciba, underwrite production costs of public service announcements for non-profit organizations such as AAP. In support of this assertion, the licensee cites the Commission's *Report and Order* of

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May 1, 1963, 34 FCC 829, and its *Applicability of Sponsorship Identification Rules, supra*, Examples 10–21 and 26. Example 26 is as follows:

> (a) A bus company prepares a scenic travel film which it furnishes free to broadcast stations. No mention is made in the film of the company or its buses. No announcement is required because there is no payment other than the matter furnished for broadcast and there is no mention of the bus company.
>
> (b) Same situation as in (a), except that a bus, clearly identifiable as that of the bus company which supplied the film, is shown fleetingly in highway views in a manner reasonably related to that travel program. No announcement is required.
>
> (c) Same situation as in (a), except that the bus, clearly identifiable as that of the bus company which supplied the film, is shown to an extent disproportionate to the subject matter of the film. An announcement is required, because in this case by the use of the film the broadcaster has impliedly agreed to broadcast an identification beyond that reasonably related to the subject matter of the film.

9. NWRO submits that WSVA–TV violated Section 317(c) of the Act by not fulfilling its responsibility to use "reasonable diligence" to obtain information from the AAP or NTN regarding Ciba's role in financing the film. NWRO states that part of the reasonable diligence required of stations under Commission regulations includes a duty to have a sponsorship announcement that "fully and fairly discloses the true identity of the person or persons by whom or in whose behalf (such) payments are made or promised." [3]

10. In response, Gilmore states that it did not violate Section 317(c) of the Act, and that this section was not intended to impose absolute liability on a licensee who unknowingly broadcasts programming material without a proper sponsorship identification as a result of the failure of others to provide it with information required by Section 508. In this regard the licensee cites former Commission Chairman Frederick Ford's statement in the *U.S. Code Congressional and Administrative News* (H.R. Rep. No. 1800, 86th Cong., 2nd Sess., 3539, (1960)):

> Subsection (c) of the proposed Section 317 would require station licensees to exercise reasonable diligence to obtain from its employees and others information to enable the licensee to make appropriate announcement of sponsorship. The term 'reasonable diligence' is appropriate in the circumstances, since it would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part. We believe that the term 'reasonable diligence' has a sufficiently accepted legal meaning so as to permit the Commission to apply this standard in given factual situations.

The NWRO emphasizes, however, that the Chairman did say that "reasonable diligence does require the licensee to take appropriate steps to secure such information as to enable it to make an appropriate announcement of sponsorship."

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[3] Section 73.654(f) in its entirety reads:

> The announcement required by this section shall fully and fairly disclose the true identity of the person or persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

11. The licensee argues that WSVA–TV satisfied the reasonable diligence requirement when Mrs. Plum, its station's Public Service and Promotion Coordinator, pre-screened the film, since it had no knowledge that production costs had been paid by Ciba. To this argument, the NWRO responds that Mrs. Plum informed its representative in a telephone conversation in early March 1972, that when public service announcements financed by nonprofit organizations are sent out, the organization under whose name the spot is being distributed often informs the station in a cover letter who has financed the production of the spot. The NWRO submits that since station personnel admit that this is an "established practice," [4] any review of the film should have included an inquiry into the source of the financing as part of the station's duty of reasonable diligence, since it asserts that Mrs. Plum could easily have made an inquiry to AAP or NTN and discovered the source of the financing.

12. NWRO contends further that WSVA–TV violated Section 317 (a) (2) of the Act, which, it states, "requires sponsorship identification in the broadcast of any material furnished without charge that discusses a controversial issue." NWRO asserts that the use of Ritalin and similar drugs for the treatment of hyperactivity presents a controversial issue. The complainant cites, *In the Matter of Amendment of Sections 3.119, 3.289, 3.654, and 3.789 of the Commission's Rules*, 34 FCC 829 at 847, 848, 25 RR 1575 at 1598 (1963) for the proposition, in NWRO's words, that,

> With respect to political programs or programs involving the discussion of controversial issues, more frequent identification and greater specificity is required as to the true identity of those furnishing the program.

13. The licensee, and AAP and NTN reply that WSVA–TV did not violate Section 317(a)(2) because the announcement did not include a discussion of the merits of Ritalin or any controversial issue of public importance for which "any film, records, transcriptions, talent, scripts, or other material or service have been furnished as an inducement to broadcast." They maintain that none of the materials covered by Section 317(a)(2)—films, records, transcriptions, etc.—were supplied by Ciba; that the pharmaceutical company's furnishing of medical research material on hyperactivity at the request of NTN did not constitute an "inducement to broadcast"; that, in any event, Section 317(a)(2) applies to the broadcast of a program containing a controversial issue of public importance and not to the production of such a program; that production is covered by Section 508 of the Act and there is no similar provision in Section 317. The AAP and NTN also refer to *Healey* v. *FCC*, 23 RR 2d 2175, 2182 (D.C. Cir., March 3, 1972) in which the Court held that the fact that a matter is newsworthy does not mean it is also a matter of public controversy. The Court recognized that a contrary decision under the fairness doctrine would "so inhibit television and radio as to destroy a good part of their public usefulness." The AAP and NTN further submit that Interpretation number 11 in the Commission's *Applicability of*

[4] NWRO has furnished no evidence, however, that it was an "established practice" for the station to receive or seek such information.

May 1, 1963, 34 FCC 829, and its *Applicability of Sponsorship Identification Rules*, *supra*, Examples 10–21 and 26. Example 26 is as follows:

> (a) A bus company prepares a scenic travel film which it furnishes free to broadcast stations. No mention is made in the film of the company or its buses. No announcement is required because there is no payment other than the matter furnished for broadcast and there is no mention of the bus company.
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> (b) Same situation as in (a), except that a bus, clearly identifiable as that of the bus company which supplied the film, is shown fleetingly in highway views in a manner reasonably related to that travel program. No announcement is required.
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> (c) Same situation as in (a), except that the bus, clearly identifiable as that of the bus company which supplied the film, is shown to an extent disproportionate to the subject matter of the film. An announcement is required, because in this case by the use of the film the broadcaster has impliedly agreed to broadcast an identification beyond that reasonably related to the subject matter of the film.

9. NWRO submits that WSVA–TV violated Section 317(c) of the Act by not fulfilling its responsibility to use "reasonable diligence" to obtain information from the AAP or NTN regarding Ciba's role in financing the film. NWRO states that part of the reasonable diligence required of stations under Commission regulations includes a duty to have a sponsorship announcement that "fully and fairly discloses the true identity of the person or persons by whom or in whose behalf (such) payments are made or promised." [3]

10. In response, Gilmore states that it did not violate Section 317(c) of the Act, and that this section was not intended to impose absolute liability on a licensee who unknowingly broadcasts programming material without a proper sponsorship identification as a result of the failure of others to provide it with information required by Section 508. In this regard the licensee cites former Commission Chairman Frederick Ford's statement in the *U.S. Code Congressional and Administrative News* (H.R. Rep. No. 1800, 86th Cong., 2nd Sess., 3539, (1960)):

> Subsection (c) of the proposed Section 317 would require station licensees to exercise reasonable diligence to obtain from its employees and others information to enable the licensee to make appropriate announcement of sponsorship. The term 'reasonable diligence' is appropriate in the circumstances, since it would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part. We believe that the term 'reasonable diligence' has a sufficiently accepted legal meaning so as to permit the Commission to apply this standard in given factual situations.

The NWRO emphasizes, however, that the Chairman did say that "reasonable diligence does require the licensee to take appropriate steps to secure such information as to enable it to make an appropriate announcement of sponsorship."

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[3] Section 73.654(f) in its entirety reads:
The announcement required by this section shall fully and fairly disclose the true identity of the person or persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

11. The licensee argues that WSVA–TV satisfied the reasonable diligence requirement when Mrs. Plum, its station's Public Service and Promotion Coordinator, pre-screened the film, since it had no knowledge that production costs had been paid by Ciba. To this argument, the NWRO responds that Mrs. Plum informed its representative in a telephone conversation in early March 1972, that when public service announcements financed by nonprofit organizations are sent out, the organization under whose name the spot is being distributed often informs the station in a cover letter who has financed the production of the spot. The NWRO submits that since station personnel admit that this is an "established practice," [4] any review of the film should have included an inquiry into the source of the financing as part of the station's duty of reasonable diligence, since it asserts that Mrs. Plum could easily have made an inquiry to AAP or NTN and discovered the source of the financing.

12. NWRO contends further that WSVA–TV violated Section 317 (a) (2) of the Act, which, it states, "requires sponsorship identification in the broadcast of any material furnished without charge that discusses a controversial issue." NWRO asserts that the use of Ritalin and similar drugs for the treatment of hyperactivity presents a controversial issue. The complainant cites, *In the Matter of Amendment of Sections 3.119, 3.289, 3.654, and 3.789 of the Commission's Rules*, 34 FCC 829 at 847, 848, 25 RR 1575 at 1598 (1963) for the proposition, in NWRO's words, that,

> With respect to political programs or programs involving the discussion of controversial issues, more frequent identification and greater specificity is required as to the true identity of those furnishing the program.

13. The licensee, and AAP and NTN reply that WSVA–TV did not violate Section 317(a)(2) because the announcement did not include a discussion of the merits of Ritalin or any controversial issue of public importance for which "any film, records, transcriptions, talent, scripts, or other material or service have been furnished as an inducement to broadcast." They maintain that none of the materials covered by Section 317(a)(2)—films, records, transcriptions, etc.—were supplied by Ciba; that the pharmaceutical company's furnishing of medical research material on hyperactivity at the request of NTN did not constitute an "inducement to broadcast"; that, in any event, Section 317(a)(2) applies to the broadcast of a program containing a controversial issue of public importance and not to the production of such a program; that production is covered by Section 508 of the Act and there is no similar provision in Section 317. The AAP and NTN also refer to *Healey* v. *FCC*, 23 RR 2d 2175, 2182 (D.C. Cir., March 3, 1972) in which the Court held that the fact that a matter is newsworthy does not mean it is also a matter of public controversy. The Court recognized that a contrary decision under the fairness doctrine would "so inhibit television and radio as to destroy a good part of their public usefulness." The AAP and NTN further submit that Interpretation number 11 in the Commission's *Applicability of*

[4] NWRO has furnished no evidence, however, that it was an "established practice" for the station to receive or seek such information.

Sponsorship Identification Rules, *supra*, at 146, is applicable to their argument:

> News releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.

14. In response, NWRO states that the controversial issue involved was not the use of Ritalin, but actually the use of medication on children who exhibit symptoms of hyperactivity. The complainant argues that the fact that medication is only one of several possible solutions to hyperactivity mentioned in the spot and the fact that Ritalin is not mentioned by name does not mean that the Commission cannot look beyond the words of the script to ascertain whether the spot involves the discussion of an issue of public controversy. In this regard, the NWRO states that the Commission ruled in the *Esso* case that a series of advertisements dealt with the Trans-Alaska pipeline controversy, even though the announcements never mentioned the pipeline. *Esso*, 30 FCC 2d 643 (1971); 31 FCC 2d 729 (1971), 32 FCC 2d 714 (1971).

15. NWRO also maintains that Ciba's furnishing of medical information to NTN constituted an inducement to broadcast; that interpretation number 11 in the *Applicability of Sponsorship Identification Rules*, *supra*, at 146 is not applicable; that NTN cannot be equated with a station, that unlike a station NTN is not required to make independent editorial decisions under the Communications Act; that it produces an announcement to meet the needs and desires of its clients; that it is not unthinkable that NTN's editorial judgment may have been affected by the knowledge that Ciba was paying the bill; that Section 317 of the Act pertains to both the broadcast and production of controversial issues; that to hold otherwise would destroy the utility of Section 317, and that although Ciba's role was technically in the production of the spot, the material it provided was obviously intended to be broadcast. NWRO also asserts that Ciba's financing of the production was in fact payment to production personnel and that according to the general statement preceding the specific examples of Part D of the *Applicability of Sponsorship Identification Rules*, *supra*, at 147, and a footnote to that part, an announcement is required by Commission regulations:

> Part D: Where service or property is furnished free for use on or in connection with a program, with the agreement, express or implied, that there will be an identification beyond mere use of the service or property in the program.
>
> Footnote 3: Of course in all these cases, if there is payment to the station or production personnel in consideration for the exposure, an announcement is required.

16. NWRO further alleges that WSVA–TV violated Section 73.654 (g)[5] of the Commission Rules which requires identification of any

[5] Section 73.654(g) states:

> In the case of any program, other than a program advertising commercial products or services, which is sponsored, paid for, or furnished, either in whole or in part, or for which material or services referred to in paragraph (d) of this section are furnished, by a corporation, committee, association, or other unincorporated group, the announcement required by this section shall disclose the name of such corporation, committee, association, or other unincorporated group. In each such case the station

corporation which pays for programs other than those advertising commercial products or services, and that Ciba's role in the financing of the announcement clearly demands identification under this regulation.

17. AAP and NTN state however, that Sections 73.654(f) and (g) of the Commission's Rules were not meant to define any new situation in which identification must be made, but were merely implemental of the substantial provisions in Section 317 of the Act. In rebuttal, the complainant argues that these subsections confirm its view of the meaning of the statute precisely because they provide the Commission's contemporaneous interpretation of the statute's language.

18. NWRO concludes its complaint by alleging that the announcement encourages parents to request drugs for their highly active children, bringing increased pressure on physicians to prescribe Ritalin.

19. In response, AAP and NTN conclude that any identification of Ciba in the spot would have appeared to be an endorsement of Ciba and its products by AAP; that stations would not accept such public service announcements because commercial identification would create an air of commercialism; that the AAP has used its official newsletter to publicize the sources of its production funds; that without corporate funding the AAP would be unable to produce public service announcements; and that the text of the announcement is unobjectionable. Gilmore Broadcasting Corporation states that the spot constitutes nothing more than a bona fide and public spirited attempt to acquaint parents with the general problem of hyperactivity and that if the NWRO's allegations were found to be valid, licensees would be reluctant to carry any public service announcement not directly produced by them for fear that it would result in an inadvertent violation of the law.

20. In its reply, NWRO suggests that if the AAP felt that a sponsorship identification would have been detrimental to the effect of the announcement, it could have requested the Commission to waive the announcement requirement under 317(d), *Letter to National Broadcasting Company and Young and Rubicam International, Inc.*, 34 FCC 2d 600, 24 RR 2d 1301 (1972), and that Ritalin, which is a major source of revenue for Ciba, is the most widely used drug for hyperactivity in children. *Report of Ciba for Senate Judiciary Committee's Subcommittee to Investigate Juvenile Delinquency*, August 6, 1971. Finally NWRO submits that Commission interpretations have not addressed themselves to the question whether industry financing of a public service announcement requires identification of an interested manufacturer as well as the nonprofit group.

DISCUSSION AND RULING

21. We shall deal first with the complainant's contention that AAP violated Sections 508(b) and (c) of the Act by failing to disclose to

shall require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group shall be made available for public inspection at the studios or general offices of one of the television broadcast stations carrying the program in each community in which the program is broadcast. Such lists shall be kept and made available for a period of 2 years.

television stations in advance of the broadcast of the announcement that "any money, service or other valuable consideration" had been accepted "for the inclusion of any matter as a part of such program or program matter." NWRO asserts that in funding the production of the announcement Ciba paid money for the inclusion of matter in it and that in addition, the supplying of research material to NTN on hyperactivity constituted the furnishing of a service "in terms of medical information." As NWRO states, the Commission has not previously addressed itself to the situation here presented regarding the funding by private enterprise of a public service announcement.[6]

22. Section 508 was incorporated in the Communications Act of 1960 following disclosure in Congressional hearings of widespread payola practices in the broadcast field. The basic principle underlying this Section as well as Section 317 is that "listeners are entitled to know by whom they are being persuaded." *Applicability of Sponsorship Identification Rules*, *supra*, at p. 141. In the present case, the available evidence is that Ciba did not request or suggest the inclusion in the announcement of any reference to itself, its product Ritalin, or even "the use of medication" (which might involve use of its product), but did suggest initially that the announcement deal with hyperactivity, and later, after reviewing the script, suggested the addition of "remedial education" as one of the methods that could alleviate the problem of hyperactivity. AAP states that it controlled and assumed final responsibility for the content of the announcement; and AAP, Ciba and NTN state that there were no agreements or understandings between them that medication would be mentioned in the announcement.

23. The question is whether (i) the acceptance of Ciba's suggestion that hyperactivity be the subject of the announcement it funded, (ii) the submission of the script and rough-cut film to Ciba by NTN, (iii) the acceptance of Ciba's suggestion that "remedial education" be added to the list of possible remedies, and (iv) the furnishing by Ciba of research material on hyperactivity, all add up to a set of circumstances justifying the conclusion that Ciba paid "money, service or other valuable consideration for the inclusion of any matter as part of such program . . ." NWRO also asserts that NTN's editorial judgment in writing the script may have been affected by the knowledge that Ciba was paying the bill.

24. In amending Section 317 and adding Section 508 to the Communications Act in 1960, Congress set forth a series of 27 examples to illustrate the effect of the *proviso* clause in amended Section 317(a).[7]

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[6] In *Letter to NBC and Young and Rubicam*, cited in par. 20, the Gulf Oil Corporation had paid for the air time in which the announcements were to be broadcast—a substantially different situation from that presented here.

[7] This clause, in referring to a station's obligation to announce that matter must be announced by a station as paid for or furnished if money, service or other valuable consideration has been accepted for its broadcast, states as follows:

> *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast."

Identical language is used in Section 508(f) to exempt from the application of that Section services or other valuable consideration furnished under the conditions set forth in the above *proviso* clause of Section 317(a).

Example 26 regarding the furnishing by a bus company of a free travel film is quoted in par. 8 above. Examples 26(a) and 26(b) state that no identification of the bus company as having furnished the film is required where no mention of the company or its buses is made in the film, or even where a bus clearly identifiable as that of the bus company "is shown fleetingly in highway views in a manner reasonably related to that travel program." Since Section 508(f) uses the same language as the *proviso* clause of Section 317(a) in defining "service or other valuable consideration" for the purposes of Section 508, we are compelled to conclude that Congress in amending Section 317(a) and adding Section 508 to the Act did not intend to require that disclosure to the licensee of acceptance of "money, service or other valuable consideration" is required in the circumstances such as those of the present case, and we so conclude.

25. Moreover, even if Example 26 had not been provided by Congress as evidence of its intent, we believe that the underlying purpose of Sections 317 and 508 was here accomplished, in that the viewers were informed "by whom they were being persuaded," namely, the American Academy of Pediatrics. We find no reason to conclude that AAP did not determine the content of the announcement or that it would have implemented any suggestions from the funding company as to content which did not accord with AAP's professional judgment as to medical validity, relevance to a significant problem and public interest to be served by broadcast of the material. Hyperactivity among children is recognized as a serious problem, and the complainant has advanced no argument to disprove the *bona fides* of AAP in determining on the basis of its special expertise in the medical problems of children that Ciba's suggestion of an announcement about hyperactivity should be accepted. There may well be other circumstances in which we might reach a different conclusion regarding failure to disclose that production of a program or an announcement was paid for by a party other than that identified on the air with it, but we do not find the facts of this particular case to require such a conclusion.

26. NWRO also alleges that Station WSVA–TV violated Section 317(c) of the Act by failing to "exercise reasonable diligence to obtain . . . from . . . persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section"; i.e., the sponsorship identification announcement required by Section 317(a). Aside from the fact that, as stated above, we find that no identification of the so-called "sponsorship" of Ciba was here required, we cannot find that the licensee failed to exercise the reasonable diligence specified in 317(c). As was stated by former Chairman Ford (see par. 10 above), this subsection "would not place the licensee in a position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part." WSVA–TV here pre-screened the announcement and noted nothing therein which appeared to raise questions as to proper sponsorship identification. The announcement contained no reference to any particular medical product or any supplier of such products. The announcement was distributed under the imprimatur of a nationally

known and widely respected professional medical organization. We believe that under the circumstances the licensee cannot be held to have violated Section 317(c).

27. The complainant also alleges that WSVA–TV violated Section 317(a)(2) of the Act. This subsection merely authorizes the Commission to require that an appropriate announcement be made "in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or services of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program." The subsection in itself thus requires nothing of a licensee. However, in Section 73.654(d) of the Rules the Commission adopted the requirement described in Section 317(a)(2) with respect to political programs or those discussing public controversial issues. NWRO claims that the controversial issue involved is the use of medication on children who exhibit symptons of hyperactivity and that the facts that Ritalin was not mentioned and that medication was only one of several possible solutions to hyperactivity mentioned do not mean that the Commission cannot look beyond the words of the script to ascertain whether the announcement involved the discussion of an issue of public controversy. It cites *Esso*, *supra*, as a case in which the Commission ruled that a series of advertisements dealt with the Trans-Alaska pipeline controversy although the announcements did not mention the pipeline.

28. As stated by NWRO, the controversal issue of public importance is whether the use of medication in the treatment of hyperactivity is a controversial issue of public importance; i.e., whether, when an announcement is broadcast that identifies the characteristics and problems of hyperactive children, that indicates several remedies, including medication, as being available and urges consultations with physicians, the licensee was unreasonable in failing to determine that the announcement raised a controversial issue of public importance.

29. In response to a Commission inquiry, Felix de la Cruz, M.D., Special Assistant for Pediatrics, Mental Retardation Branch, National Institute of Child Health and Human Development, reviewed the announcement in question and found that "it had no medically controversial implications." He stated specifically that the statement that "sensitive care, remedial education and in some cases the use of medication can help these children . . ." was "fair and not misleading." He explained that "the treatment for hyperactive children commences with individual attention and placement in a special educational environment and that drug therapy is initiated when this attention and specialized environment is not substantially effective and most often when the hyperactivity is considered to be a symptom of minimal brain damage." The AAP and NTN submitted several publications (copies of which were sent to the NWRO) that indicate that medication is one of several methods used commonly for the treatment of hyperactivity in children. "An Evaluation of the Pharmalogic Approaches to Learning Impediments," 46 *Pediatrics* 142 (July 1970); "The Hyperkinetic Behavior Syndrome," *Medical Insight*, pp. 22–29,

(November 1971); "Hyperactivity in Children," 11 *Clinical Pediatrics* 30, (January 1972). These articles also disclose that Ciba's Ritalin is only one of several medications used for the treatment of hyperactivity in children. The report by Ciba before the Senate Judiciary Committee's Subcommittee to Investigate Juvenile Delinquency (August 5, 1971) also indicated that Ritalin, while popular, was not the only drug used for the treatment of hyperactivity. In this regard, Dr. de la Cruz also stated that "Ritalin is not necessarily the drug of first choice in treating hyperactive children. Depending upon the child and upon the preference of the physician, an amphetamine, an anti-convulsant, a psychotropic agent such as Ritalin, or even other drugs may be chosen." Moreover, of course, the use of Ritalin was never mentioned in the announcement. It would indeed be difficult to read into the phrase "and in some cases medication" the issue of public controversy which NWRO seeks to attribute to it. Therefore it can be concluded that the licensee did not incorrectly determine that the announcement presented no controversial issue of public importance.

30. The present case is clearly distinguishable from *Esso*, where a public controversy clearly existed and where, contrary to NWRO's assertion, one of the announcements mentioned a pipeline. In its final ruling on that case denying a petition for reconsideration by the original complaint, *Esso*, 32 FCC 2d 714 (1971), the Commission clarified its prior two rulings as to the basic issue involved:

> . . . The clear tenor of our prior treatment of this matter has been that the basic controversial issue involved is the proposed construction of an Alaskan oil pipeline. While we have recognized that the parties to the dispute were in disagreement over both the need for developing Alaskan oil reserves quickly and the ecological effects of transporting oil from Alaska by pipeline, we have not suggested and do not believe that these two facets of the basic problem should be treated as independent controversial issues to be examined separately under the fairness doctrine. (*Esso, supra.* at pp. 714–715.)

The present case is in no way comparable to *Esso*. There, we found no question on the basis of existing facts as to the presence of a controversial issue of public importance; the only question raised by complainants' petition for reconsideration was whether there were two distinct issues, and we found there were not. In the present case no evidence has been offered by the complainant that the announcement in question ever raised a controversial issue of public importance, and as noted above, their appears to be good medical authority for finding that no such issue was raised.

31. Finally, NWRO alleges that WSVA–TV violated subsections 73.654 (f) and (g) of the Rules. (See footnotes 3 and 5 above for their texts.) We find no violation, however, and agree here with the contentions of AAP that these two subsections were not intended to define any new situation in which identification of a sponsor or furnisher of broadcast material need be made but were intended merely to supplement the substantial provisions of Section 317 of the Act. Section 73.654(f) is intended primarily to prevent concealment of sponsorship by use of an agent, in situations where sponsorship identification is clearly required, which we have found not to be the case here. Section 73.654(g) requires that under certain circumstances if a program is

sponsored or furnished to a station by a corporation, committee, association or unincorporated group, the name of such corporation or group shall be announced. In the present case, the organization furnishing the announcement—AAP—was clearly identified in the announcement.[8]

32. For the foregoing reasons, the complaint of the National Welfare Rights Organization against Gilmore Broadcasting Corporation, the American Academy of Pediatrics and the Ciba Pharmaceutical Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

I have no objection to the American Academy of Pediatrics—or any other bona fide professional group—producing and distributing public service announcements providing health information. Indeed, I would encourage such groups—and broadcasters—to bring more such information to listeners and viewers.

I have very strong objections to drug companies—or other heavy advertisers—using such groups as a cover in a broad (even "public spirited") secret effort to promote the sale of their products.

Nor can I conclude that the issue of whether or not to give kids drugs as a way of reducing their nuisance value to teachers, parents and other adults is "non-controversial."

I dissent.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

The National Welfare Rights Organization (NWRO), representing the interests of parents concerned about drug abuse (hence, any undue emphasis on drugs as problem solvers), has complained about certain spot announcements on the affliction known as hyperactivity run by many television stations, the production costs of which spots were paid for by a pharmaceutical manufacturer which produces a drug used in treatment of the disorder. It is not so much the fact that the production costs were underwritten by a drug manufacturer that concerns NWRO, but that the announcements were identified as "a public service announcement by the American Academy of Pediatrics (AAP)", a pre-eminent organization of children's doctors, under whose auspices the spots were made and distributed, without any indication of the pharmaceutical manufacturer's financial interest in

[8] In fact, the U.S. Court of Appeals held in *U.S.* v. *WHAS, Inc.*, 385 F. 2d 784, that even though the licensee had knowledge that the funds used to buy time for a political program had been furnished by an organization other than that identified as the sponsor, there was no violation of 73.654(g) because, if the alternatives are eliminated from the language of the rule, it reads,

> In the case of any program . . . which is sponsored . . . by a . . . committee . . . the announcement required by this section shall disclose the name of such . . . committee.

The Commission has proposed rule-making to clarify the rule. 34 FCC 2d 1104 (1972). This proceeding has not yet been completed.

producing the spots or its interest in the sale of hyperactivity medication.

I concurred in this decision for two principal reasons: (1) the text of the announcements at issue did not—at least to me—expressly plug drugs (let alone the particular drug produced by the industrial benefactor); and (2) the fact that the AAP, a reputable medical association which was fully identified, did edit and took responsibility for the presentation. Accordingly, I cannot find a breach of communications law as written or interpreted and it would be inequitable to penalize either the broadcasters involved, the AAP, or the manufacturer for conduct not deemed proscribed. Let me hasten to inject that my issuance of a separate statement does not, by implication, mean that I oppose the practice of underwriting or subsidizing the presentation of *Bona fide* public interest announcements by commercial entities or that a specific identification of the source of every gram of private assistance rendered should be required in connection with the dissemination of public service advertisements. I would no more restrict the financial or technical support of public service ads by private industry—just because they are private—than I would advocate a ban on similar charitable or *pro bono* activities of businessmen in nonbroadcast fields. Moreover, I am apprehensive that a strict requirement that all private support sources be identified in the presentation of public service announcements would curtail the preparation of worthwhile, well-produced public interest spots. No better example of an important health problem heretofore undercovered by the media can be found than hyperactivity, a seriously misunderstood condition which the spots in instant matter (according to all reports) do an excellent job of in terms of illuminating the problem, identifying symptoms, and recommending professional guidance.

But, the NWRO complaint does focus on an enigma that has previously vexed the Commission, the Congress, and broadcasters themselves. Namely, what ethical considerations are involved in the dissemination of material in the form of public service announcements when one of the progenitors of the announcement has a vested commerical interest directly related to the substance of the spot. Without casting aspersions on the manufacturer here involved or discrediting its motives in promoting the hyperactivity announcements, it is unavoidably clear that the company is in the business of marketing a drug, the sales of which drug stand to increase if more people are aware and seek treatment of hyperactivity. A potential conflict of interest is readily apparent and NWRO is justified in pointing out these circumstances.

There are, consequently, strong public interest arguments to be made both for and against expanding the application of our sponsorship identification rules, critical in the case of commercial and political spots, to public service anouncements. My preference in this case would have been the issuance of a Notice of Inquiry looking into the issue of private subsidization of public service spots in order to more fully hear and consider all sides of this important question. The Inquiry

could have elicited present industry practices, the possible need for circumscribing those practices more definitively while at the same time increasing industry awareness that a line must be drawn between legitimate public interest messages and those which subtly serve as institutional ads. Where the appeal of an announcement is significantly commercial, NWRO is correct in demanding that the public be apprised of the real party in interest making the pitch.[1]

[1] That the Commission is concerned with adequate identification of the fire behind the smoke is underscored, ironically, by a Public Notice, entitled *Identification of Source Of, Or Party Supplying Certain Broadcast Matter* (FCC 73–595, June 1, 1973) adopted the same day as the Commission acted on this matter. The Public Notice above was inspired by complaints that some licensees had failed to properly identify, of all people, "Uncle Sam" as the source of various program matter, thus misleading the public into believing that someone other than the federal government was responsible for the message.

In another area, the Commission is equally concerned by newspaper and other revelations that certain sports announcers may be receiving instructions and/or compensation from the sports organizations whose activities they cover without apprising the public of the connection.

Hence, the whole question of anonymous influence on broadcast material is ripe, I think, for Commission exploration. There may be nothing wrong with present practices, but it is always instructive to analyze them.

F.C.C. 73-568

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaints by
SENATOR FLORIAN W. CHMIELEWSKI, BOARD OF COMMISSIONERS OF PINE COUNTY, MINN., COUNTY HIGHWAY ENGINEER
Concerning Personal Attacks Under the Fairness Doctrine Re WCMP Broadcasting Co.

MAY 23, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

WCMP BROADCASTING CO.,
Licensee of Station WCMP,
Post Office Box 230,
Pine City, Minn.

GENTLEMEN: This refers to complaints filed against the licensee of Station WCMP, Pine City, Minnesota, the licensee's response to the complaints, and the comments of the complainants on the licensee's response.

A summary of the complaints, the licensee's response and further correspondence in connection therewith is attached hereto as Appendix A and is incorporated herein by reference.

The complainants, consisting in one instance of the Board of Commissioners of Pine County, Minnesota and the County Highway Engineer, and, in the other, Minnesota State Senator Florian W. Chmielewski, allege that in connection with broadcasts on WCMP by the president of the licensee, Mr. Gerry Robbins, the licensee failed to comply with the fairness doctrine, violated the Commission's personal attack rules, and used the station to advance his personal political interests.

The County Board and Highway Engineer allege that in his broadcasts on WCMP in March and April 1972, Mr. Robbins discussed controversial issues of public importance without affording reasonable opportunity for presentation of contrasting views; violated the personal attack rules by attacking the honesty, character, integrity or like personal qualities of the complainants during such discussions without complying with the requirements of Section 73.123(a) of the rules; presented editorial comments which were "slanted and inaccurate" although he was in possession of the true facts; gave no advance notice of his comments and kept no tape or transcripts of the comments which were available to the public; and used the facilities of WCMP to advance his private interests, in that at the time he attacked

members of the County Board and specifically one such member, he was planning to run against this member for nomination to his office and thereafter to seek such office in the general election.

State Senator Chmielewski makes essentially the same allegations against the licensee, charging that a personal attack was broadcast against him during discussion of a controversial issue of public importance; repeated harassment of "people and particularly public officials"; violation of the fairness doctrine; and use of the station by Mr. Robbins "to create public opinion strongly in his favor so he could be elected to the County Board of Commissioners."

In response to a Commission request for comment on the above complaints, the licensee states that none of the matters cited by the complainants were controversial issues; that the station has never attacked the personal honesty or integrity of any public official and the cited quotations did not constitute personal attacks; that the purpose of Mr. Robbins' program is to stimulate the thinking and encourage greater interest in the minds of listeners and to stimulate robust, wide-open debate; that WCMP is the only local medium actively involved in bringing pending governmental matters to the attention of the listening audience; that although none of the cited matters were controversial and none of the quotations constituted personal attacks, the licensee encourages public officials and other citizens to comment on such matters, and has repeatedly invited officials, including Senator Chmielewski, to appear, but that "With the exception of canned news releases on very rare occasions, the said officials have declined to use the air to inform the electorate." The licensee also states that during the time of Mr. Robbins' comments on one of the issues in question (the state tax bill), WCMP carried numerous statements with other viewpoints. The licensee further asserts that the factual statements made on the program in question were thought by Mr. Robbins to be correct. Finally, the licensee states that although Mr. Robbins on July 17, 1972 filed for the office of Pine County Commissioner in the primary election, he at that time immediately ceased being the host of the program until after the elections, and that he denies "using the facilities for purely personal and private interest in promoting such candidacy and election."

In their comments on the licensee's response, the County Board and Highway Engineer state that contrary to the licensee's assertion,

> "Complainants at all times prior to April 5, 1972, have appeared on this station when asked, and have further determined that to the best of the knowledge of the County Sheriff, County Auditor and Clerk of the District Court, they have always appeared on this station when asked."

Complainants assert that the licensee's broadcast statements quoted in their complaint involved controversial issues of public importance and were made so by Mr. Robbins' repeated broadcasts about them; that they believed that their personal honesty and integrity were attacked by statements that they had "hoodwinked" a governmental agency "through wasting money by buying pickup trucks and using

them for taxi service and hiding the pickup trucks at the Fairgrounds," as well as by Mr. Robbins' allegation that Commissioner Ausmus (whom he subsequently defeated in the primary election) had made a "champagne flight to Washington to attend the Cherry Blossom Festival" whereas he was authorized to go there on government business, and the allegation that the County Board was "given away" land in violation of the Veteran's Preference Law.

Senator Chmielewski, in his comment on the licensee's response, again states that he believes that Mr. Robbins' statements were controversial; that since the station keeps no tape or transcript of the broadcasts "those accused and criticized are defenseless unless they would have set up a daily taping session"; that the Senator received only one invitation to respond to Mr. Robbins' comment and responded promptly; that during Mr. Robbins' ownership of the station, Mr. Chmielewski has been unable to find "anyone else that has even been notified"; that although the licensee denies questioning his integrity, the licensee's remarks that the Senator "could care less about a few billion here or 15 billion there since it doesn't come out of my pocket" were a serious reflection on his character. Finally, Senator Chmielewski states that public servants could rightfully be reluctant to present news releases to WCMP "since the releases will be literally 'torn to bits' on his [Robbins'] morning show."

We shall consider first the allegations that the licensee failed to comply with the requirements of the fairness doctrine. As set forth in our *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, and more fully explained in our Public Notice on this subject dated July 1, 1964, 29 Fed. Reg. 10416, and in subsequent rulings, the fairness doctrine requires a licensee who presents one side of a controversial issue of public importance to afford reasonable opportunity for presentation of opposing viewpoints. Unlike the provisions of Section 315 of the Communications Act relating to political candidates, the fairness doctrine does not require precise equality of time for opposing viewpoints; nor need opposing views be presented on the same broadcast or series of broadcasts, provided that the licensee attempts to present them in his overall programming. The licensee may use his discretion in determining the issues to be discussed, the format of the programs to be employed, the different shades of opinion to be presented, and the spokesmen for each point of view. The Commission will not substitute its judgment on such matters for that of the licensee and will review them only as to whether the licensee appears to have acted reasonably and in good faith.

In the present case, Mr. Robbins' judgment that none of the statements cited by complainants involved controversial issues of public importance appears to have been unreasonable, not only on the basis of the statements of the complainants but based on a review of the language itself, the accuracy of which the licensee has not disputed. See, for example, Exhibits A, B, C, D and F to the County Board's complaint in Appendix A, wherein Mr. Robbins charged waste of tax money by the County Board, "a giveaway" of public land by the Board in violation of the law (a matter on which a public hearing was

being held at the time), and lack of planning by the Board. See also Exhibits A, B and F to Senator Chmielewski's complaint, dealing with debate in the State Legislature on a tax bill and criticism of the county commissioners. See also subparagraph 7 of the summary of the licensee's response in Appendix A, stating that the Governor had vetoed the new tax bill and an extra legislative session had been called which lasted 53 days without agreement, and the licensee's statement that,

> "Editors of papers all over the state had opinions [on the tax bill] and expressed them, with the exception of Pine County papers . . . they had very little editorial comment [and that WCMP felt local discussion was necessary and] Our decision to create an atmosphere of give and take on a local basis, involving the effects locally, was . . . correct."

The clear import of these statements was that a controversy existed regarding actions of the County Board and the State Legislature. We find, therefore, that the licensee's judgment that no controversial issues of public importance were involved in Mr. Robbins' discussions was unreasonable.

The evidence before us does not clearly establish, however, that the licensee failed to make reasonable opportunity available for presentation of contrasting views on these issues. Contradictions exist between the statements of the licensee and those of the complainants as to whether, and if so how often, the licensee invited them and other public officials to express their views on WCMP, but the fairness doctrine does not require a licensee to invite any particular person or group to express contrasting views, provided that the licensee makes an attempt to present such views. In this connection we note the licensee's statement that it repeatedly invited comments by officials and other citizens, and the comment of Mr. Robbins quoted at the end of Exhibit B to the County Board's complaint to the effect that "Equal time will be offered, as we have just said, four or five times . . . If you would like to make some comments, we'd like to hear from you, whoever, you are. In writing, by tape, live, you name it, on this program. Just get in touch, and we'll be happy to make arrangements." We also note Mr. Robbins' letter to the County Board (Exhibit F), in which he stated that "The board is welcome to use the air to discuss anything they wish, whether or not they use it to respond to a WCMP editorial."

On the other hand, we note the Board's assertion with respect to Exhibit C (discussing the land "giveaway") that the broadcast included no statement that time would be afforded for presentation of contrasting views. We note further that all of the complainants take issue with the licensee's claim of repeatedly having invited comment by public officials, and that in his comment on the licensee's response, Senator Chmielewski stated that public servants could rightfully be reluctant to send news releases to WCMP because "the releases will be literally 'torn to bits' on his morning show."

We also note that Mr. Robbins' invitations appear to have been couched in terms that might lead others to conclude that they must appear, in person, by tape or through written statements, on Mr. Robbins' own daily program. Although, as stated, a licensee has discretion as to the format for presentation of contrasting views, we believe that where repeated partisan criticism is voiced by the president of the licensee itself on his own program, the fairness doctrine requires something more than presentation of contrasting views limited to joint appearances with him on a program whose content he controls, and where, as has been complained in other cases, the licensee will "always have the last word." [1] If in fact the licensee limited expression of contrasting views to the program over which he presided, and especially if, as charged by Senator Chmielewski, the news releases of others were "torn to bits" by Mr. Robbins after he read them, questions exist as to the licensee's implementation of the purposes underlying the fairness doctrine.

Thus, although we cannot rule on the basis of the information before us that the licensee has failed to comply with the fairness doctrine, we call its attention to the questions above set forth, and shall expect that it take cognizance of them in the future. We wish to emphasize, however, that we merely seek compliance with the requirements of the fairness doctrine rather than to discourage presentation of programs such as this, and that we endorse the licensee's expressed purpose of bringing pending governmental matters to the attention of its audience, encouraging greater interest in the minds of listeners, and stimulating robust, wide-open debate.

We turn next to the allegation that in his criticism of members of the County Board, particularly Commissioner Ausmus in whose district Mr. Robbins lived and whom he later defeated in the primary, Mr. Robbins was using a licensed broadcast facility for his private interest.

In support of this allegation, complainants submit affidavits to the effect that on March 9, 1972—which was during the period in which he was voicing repeated criticism of the County Board and preceding the dates of some such broadcasts—Mr. Robbins stated that he intended to become a candidate for election to the County Board. A similar affidavit by Senator Chmielewski was submitted, and he forwarded to the Commission a public statement by Mr. Robbins dated July 15, 1972, which included the following language:

> It has been said from time to time that Gerry Robbins is too critical of the operation of the Pine County Government. Very obviously, I don't totally agree. I have been critical, but find it difficult to be *TOO* critical. I think it's past time that more time was spent in the management of county government. Good business practices must be applied. I have filed for the office of County Commissioner from the 2nd District, and if elected will make every effort to do just that.
>
> Over the past several years the cost of Pine County Government has risen steadily. The rise has been dramatic and not totally necessary. More and more

[1] See *Report on the Broadcast of "Living Should Be Fun"*, wherein we stated ". . . those licensees who relied solely upon the built-in fairness of the program itself, or upon Fredericks' invitation to those with opposing viewpoints, cannot be said to have properly discharged their responsibilities. Neither alternative is likely to produce the fairness which the public interest demands." 33 F.C.C. 101, 107 (1962).

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of the spending decisions are being placed in the hands of employees. If a real attempt to reduce costs is to be made, this responsibility must be placed back in the hands of the elected Commissioners . . . I pledge to the voters of Pine County and especially the 2nd District, "If elected, I will spend more time performing the real functions of Pine County Commissioner, if elected I will 'work' at reducing costs in County Government."

In answer to these allegations, Mr. Robbins denies "using the facilities for purely personal and private interest in promoting such candidacy and election."

With respect to this part of the complaints, we note that Mr. Robbins in his response did not deny the affidavits of two County Board members that as early as March 9 he stated an intention to become a candidate for election to the Board, and therefore on the record we must assume that he had made such a decision by that date. We also note that much of the language in Mr. Robbins' formal announcement of his candidacy was almost a summary of criticism of the Board and its members which he had been expressing in his broadcasts. Finally, we note that we have no indication that in criticizing the Board between March 9 and the date of his formal announcement of candidacy, Mr. Robbins disclosed in his broadcast discussions of the Board that he intended to become a candidate for election thereto.

We do not, of course, question the licensee's right to criticize the Board, but we believe that where a licensee or its principal has in fact made a decision to become a candidate for public office and is using the licensed facility in such a way as to advance his intended candidacy, he has an obligation to disclose his intended candidacy to the public in such broadcasts, so that the public will be better able to evaluate his comment. Although most prior Commission rulings regarding disclosure of personal interests have dealt with financial interests, we believe the same principle governs personal political interests as well, since our basic purpose is that the public shall know by whom it is being persuaded.

This was the purpose underlying our ruling in *Gross Telecasting, Inc.*, 14 FCC 2d 239 (1968), wherein we stated,

> Although a licensee's obligation to serve the public interest would not preclude it from editorializing on matters in which it has a significant personal interest as in this case, its decision to do so would impose a responsibility to reveal to the broadcast audience the extent and nature of its private interest . . .

Similarly, in our *Letter to National Broadcasting Company*, 14 FCC 2d 713 (1968), we found that a licensee might permit a commentator to discuss matters in which he had a private interest only "while divulging the nature of this conflict to the audience, so that they are made aware of the fact that in this instance the commentator does have a significant private interest in the matter he is discussing."

We conclude that if in fact Mr. Robbins had determined to become a candidate for election to the County Board by the date specified in the affidavits of the two Board members, the public interest required that he disclose his intended candidacy during broadcasts which might reasonably be expected to advance his candidacy. We expect adherence to this requirement in the future.

We turn next to the allegations that Mr. Robbins stated purported facts which he knew to be untrue, e.g., with respect to the number of pickup trucks owned by the county and whether they were used as taxis. As we have frequently stated, we decline to intervene into allegations of falsification or distortion of news unless substantial extransic evidence is presented that the licensee deliberately falsified or distorted it. See *Letter to ABC, et al.*, 16 FCC 2d 650 (1969); *Hunger in America*, 20 FCC 2d 143 (1969); *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969).

It should also be pointed out that, as the licensee here asserts, the Commission has set forth no requirement that stations normally make or retain recordings or transcripts of their broadcasts. However, in certain circumstances licensees are required to transmit to designated persons or groups recordings, scripts or (in their absence) accurate summaries of material broadcast. Thus, our personal attack rule (Section 73.123 for standard broadcast stations) provides:

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack, and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

We have reviewed the transcripts of Mr. Robbins' broadcasts submitted by the complainants in light of their allegations that the licensee violated the personal attack rule. Although parts of the criticism voiced by Mr. Robbins might understandably be interpreted by Senator Chmielewski and the County Board as constituting attacks upon them, we cannot find unreasonable the licensee's judgment that the language did not fall within the Commission's definition of a personal attack. Criticism of a public official's wisdom, judgment or actions is not necessarily an attack upon his "honesty, character, integrity or like personal qualities," and we have stated that we shall not impose penalties in this area if the licensee could have had a reasonable doubt whether such an attack had taken place, or indeed in any case which does not involve a flagrant, clear-cut violation. See Notice of Proposed Rule Making, 31 Fed. Reg. 5710–11 (1966); *Letter to L. E. White, Jr.*, 11 FCC 2d 687 (1968).

We believe that Mr. Robbins' remarks regarding the Governor, the State Legislature and State Senator Chmielewski could reasonably be regarded by the licensee as other than personal attacks. We find, further, that his allegations that the County Board was selling the Kettle River land at "giveaway" prices in violation of the Veterans' Preference Law did not constitute personal attacks within the meaning of our rules. In *Metromedia, Inc.* (*KMBC–TV*), 33 FCC 2d 304 (1972), the licensee's broadcasts had charged certain judges with violation of the law in sentencing criminals. In our letter to the licensee, we stated,

> In reviewing personal attack complaints, the Commission's function is not to substitute its own judgment for that of the licensee, but to determine whether

the licensee has acted reasonably and in good faith in arriving at its decision as to whether a personal attack has been made. (*Robert B. Choate*, 29 FCC 2d 73 (1971).) We find no reason to disagree with your judgment in this case. The excerpted statements contained no personal vilification of the named judges, and made no accusations as to the possible motivations of the judges in deciding the cases. There was obviously strong disagreement with the judges' actions, but no more. There is an important distinction . . . between contending that a judge has exceeded his discretion in the legal sense or that he has erred in deciding a case, and charging that he has decided a case because of improper or corrupt motives. Since the broadcast statements included no language which can be fairly construed as reflecting on the judges' personal qualities, we conclude that you did not act unreasonably in determining that no personal attacks were made on the judges mentioned in the Probe series.

We also believe that the remarks about a "champagne flight" to Washington did not constitute a personal attack, but were primarily intended as a jest, and could have been so understood.

We find greater difficulty regarding the allegations by Mr. Robbins that the County Board and/or County Highway Engineer Kenneth Paulson had parked county pickup trucks at the Fairgrounds "to hide them," had "hoodwinked" a governmental agency with respect to the trucks, and were "using them for taxi service." However, the question again is not what our initial view might be unaided by the licensee's determination, but rather whether the licensee could reasonably judge the allegations not to involve personal attacks. Under that standard, we find insufficient basis to upset the licensee's determination here.

We remind the licensee, however, of our conclusions above that (a) its judgment that none of the statements of Mr. Robbins involved controversial issues of public importance appears to have been unreasonable; (b) if the licensee limited expression of contrasting views to the program over which its principal presided, questions are raised as to the licensee's implementation of its fairness doctrine obligations, and (c) if in fact Mr. Robbins had determined to become a candidate for election to the County Board, the public interest required that he disclose his intended candidacy during broadcasts which might reasonably be expected to advance his candidacy.

We shall expect the licensee to be guided accordingly in its future operation of Station WCMP.

Commissioner Johnson dissenting; Commissioner Wiley concurring in the result.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

Summary of fairness doctrine and personal attack complaints against Station WCMP, Pine City, Minnesota, together with licensee's response and complainants' comments on response:

Under date of June 7, 1972, the five County Commissioners of Pine City, Minnesota, and the County Engineer of the County Highway Department filed a complaint against the licensee of Station WCMP, Pine City, Minnesota, alleging violation of the fairness doctrine and the personal attack rules by Mr. Gerry Robbins, President of the licensee, during broadcasts of his daily discussion and telephone call-in program which is titled "Six County Chatter—What's Right and What's the Matter." A somewhat similar complaint alleging violation of the fairness doctrine and personal

attack rules on the same program was submitted under date of June 21, 1972, by State Senator Florian W. Chmielewski of Minnesota. In response to a Commission request, the licensee submitted its comments on the complaints, dated October 19, 1972. Thereafter, the Board of Commissioners and County Engineer submitted their comments on the licensee's response, dated October 27, 1972, and Senator Chmielewski submitted his comments under date of October 30, 1972.

COMPLAINT OF COUNTY COMMISSIONERS AND COUNTY ENGINEER

The County Commissioners and County Engineer, Kenneth Paulson, alleged, *inter alia*, that the licensee violated the fairness doctrine in handling controversial issues of public importance during the previous several months during Mr. Robbins' morning program, "Six County Chatter—What's Right and What's the Matter," in that the licensee did not afford reasonable opportunity for presentation of other viewpoints, gave no advance notice of its own comments and kept no tape or scripts of the comments which were available to the public; that WCMP violated the Commission's personal attack rule by attacking the honesty, character, integrity or like personal qualities of the complainants during presentations of views on controversial issues, without complying with the requirements set forth in Section 73.123(a) of the Rules; and that Mr. Robbins' editorial comments had been "slanted and inaccurate."

Attached to this complaint were exhibits which were stated to be transcripts of portions of some of the programs, and which in its later response the licensee did not deny were at least reasonably accurate summations of the programs.

Exhibit A was a transcript of a portion of a program believed to have been broadcast on March 8, 1972. It stated, with reference to the Pine County Highway Department,

> . . . And I understand they bought another pickup [truck]. I understand Pine County bought another pickup. I don't know if it's 17 or 18, I've lost track. We've got the darndest fleet of pickups you've ever seen in your life. They went and parked three out at the fairgrounds, that's what they did, to hide them. They didn't need them . . . We've got more pickups running around than Carter's got little liver pills. Most useless piece of equipment that ever drove on the road. For a fact. Anybody who owns one knows it's true. The most useless piece of equipment for going anywhere in the world. If you don't put a bunch of weight in the backend you've got no more traction than the man in the moon.

Exhibit B was a transcript of a portion of the broadcast of March 31, 1972, stating that in a conversation with the Chairman of the County Board of Itasca County, Mr. Robbins had learned that that county had more than twice as much road mileage as Pine County, yet had only 17 employees in its highway department and only 12 pickup trucks, "something like four less or five less than Pine County." The transcript concluded as follows:

> . . . I think it's the biggest waste of money that anybody ever hoodwinked governmental agency with. We are using them for taxi service. And I don't think we can afford taxis in this day and age. Equal time will be offered, as we have just said, four or five times, just like Mr. Genrud [?] did. If you would like to make some comments, we'd like to hear from you, whoever you are. In writing, by tape, live, you name it, on this program. Just get in touch, and we'll be happy to make the arrangements. Full cooperation, and that is so denoted in our laws [logs?] as it is today.

Exhibit C was a transcript of portions of the broadcast of April 4, 1972, dealing with what Mr. Robbins termed a "give-away" of land bordering the Kettle River. The transcript stated that a hearing was to be held on the subject that day at the County Court House; that the County Board had paid thousands of dollars to a planning commission which had recommended "that this type of land not be sold without an adequate plan"; that, however, "Pine County has no plan in regard to the land" and "There has been nothing done that would even make an amateurish attempt to saving the ecological beauty of the area." Mr. Robbins advocated a different plan for dealing with the land in question, and stated

that "I think it's time we started talking about a little planning instead of running helter-skelter and selling off those valuable lands at the lowest possible price that we can get for them." The transcript also quotes him as referring to the County Board plan as "a big land give-away" and stating that,

> . . . The publicity on it has been merely in the minutes of the County Board meeting from last month. Don't want to make too much noise about these things and get everybody excited, because people might be opposed to the action.

The transcript contains a further statement to the effect that the Board's plan would be in violation of the Veteran's Preference Law. The complainants state that this broadcast included no statement that time would be afforded for presentation of contrasting views.

Exhibit D is a transcript of a portion of the program of April 5, 1972, dealing with the previous day's hearing and debate as to the course to be followed by the County Board regarding the Kettle River land. It quotes Mr. Robbins as stating,

> . . . it is against the law to sell these lands under the veteran's preference. Under any circumstances it is a violation of the law very plainly outlined in the statutes. Certain members of the board didn't want to believe that. But at any rate, it is, and a check with the county attorney will tell them that. The only reason that I bring this out is that it is time now for an immediate change of policy on the part of the county boards . . .

Exhibit E, appended as an undated transcript, begins with what appears to have been the conclusion of a discussion of a "champagne flight." In the complaint to which these exhibits were attached, complainants stated that, in referring to a trip made by Commissioner Ausmus and Highway Engineer Paulson under authorization of the County Commissioners to attend "a meeting of Minnesota Good Roads Congressional Meeting in Washington, D.C.," Mr. Robbins "referred to this in a derisive tone of voice as 'A champagne flight to Washington to attend the Cherry Blossom Festival.' "

Exhibit F is a copy of a letter from Mr. Robbins to the Chairman of the County Board in response to a letter from him dated April 4, 1972. The licensee's letter lists topics discussed on the program on four days in March and states,

> There are no scripts kept of these discussions since such is not a requirement of the station. Very obviously, however, the Pine County Engineer or someone has the tapes of the program so content is not a problem. Regardless of the program content, the Pine County Board is welcome to equal time at any time. We have said this over and over again and we repeat it here. In fact equal time is not a necessity. The board is welcome to use the air to discuss anything they wish, whether or not they use it to respond to a WCMP editorial.

Exhibit G is an affidavit executed by Kenneth Paulson, County Engineer of Pine County referring to the alleged reference to a "champagne flight 'to attend' the Cherry Blossom Festival," but dealing principally with the broadcasts regarding the number of pickup trucks owned by Pine County and by Itasca County. (See above summaries of Exhibits A and B.) Mr. Paulson states that on July 29, 1971, he gave Mr. Robbins, then President of the Pine County Concerned Taxpayers Association, a list of the equipment owned by the Pine County Highway Department which showed that the county at that time owned 11 pickup trucks; that on March 31, 1972, Mr. Robbins made the remarks described in Exhibits A and B about the number of pickups owned by Itasca and Pine Counties, indicating that Pine County had 16 or 17 such trucks; that on April 3, 1972, Mr. Paulson was informed by the Itasca County Engineer that that county's highway department, in fact, had 98 fulltime employees rather than the 17 stated by Mr. Robbins, and that Itasca County has 28 pickup trucks rather than the 12 stated by Mr. Robbins; that in March 1972 Mr. Robbins repeated the statement that Pine County had 17 or 18 pickups, that some were parked at the fairgrounds in order to hide them and they were used by the County Engineer's office for taxi service. Mr. Paulson states that, in fact, "said equipment was parked at the fairgrounds because housing was available for them there and the pick-ups were used in the normal and usual business routine of the Pine County Highway Department."

Exhibits H and I are affidavits of County Commissioners Everett Koecher and Clarence Nordstrom to the effect that on March 9, 1972, Mr. Robbins stated in their presence that he intended to file for election to the Pine County Board of Commissioners in the coming 1972 election. Commissioner Koecher also states that on March 9 he had informed Mr. Robbins that he was in error in stating that the Pine County Highway Department had as many as 17 or 18 pickup trucks.

Exhibit J is an affidavit executed on May 12, 1972, by State Senator Chmielewski to the effect that on more than one occasion in 1972 he had heard Mr. Robbins state that he intended to file that year for election to the Pine County Board of Commissioners.

The complainants stated they believed that Mr. Robbins had a personal interest in attacking the present Pine County Board of Commissioners since he had recently stated that he was going to file for election to that body.

SENATOR CHMIELEWSKI'S COMPLAINT

Under date of June 21, 1972, State Senator Chmielewski filed a complaint against Station WCMP alleging the broadcast of a personal attack against him and violation of the fairness doctrine during discussion of controversial issues of public importance. He stated that he could find only one instance where the persons named in WCMP editorials on controversial issues were notified by WCMP "pursuant to the rules embodied in the fairness doctrine." The complaint also stated that Mr. Robbins had repeatedly harassed "people and particularly public officials"; that on April 10 Mr. Chmielewski had informed the station that he would compile a case and ask for an investigation, and that "Since that time . . . WCMP has changed the subject matter substantially leading me to conclude that they do realize that they have been in violation of F.C.C. regulations."

Exhibit A to Senator Chmielewski's complaint was stated to be a transcript of a portion of a broadcast by Mr. Robbins in 1971. Underlined portions were as follows:

> . . . Mr. Chmielewski in his very brief session down in St. Paul has all of a sudden turned out to be a political seer . . .
>
> * * * * * * *
>
> . . . But the point of the matter is that Mr. Chmielewski seems to feel that $11, $12, $14 million dollars, a few billion here and there, really means absolutely nothing, as long as somebody else is spending it.
>
> * * * * * * *
>
> . . . it's interesting to note that Mr. Chmielewski was not invited to serve on the conference committee, because he's a greenhorn in the Senate, and he really doesn't know what it's all about . . .
>
> * * * * * * *
>
> Mr. Chmielewski is in a hurry to get out of St. Paul.

Exhibit B (undated) contains the same language quoted above from Exhibit A of the complaint of the County Commissioners; criticism of the State Legislature and the Governor on the grounds that the legislature's attitude was that "the taxpayers be darned" and that the Governor had vetoed a tax bill "because it doesn't gouge the people of Minnesota enough"; and a statement that taxpayers were going to have to start talking action regarding high taxes at the local level. Mr. Robbins then described the Concerned Taxpayers Association as an organization with that purpose and stated that "Our next meeting . . . takes place tomorrow, Thursday evening, at the Community Room of the Village Hall . . ."

The second part of Exhibit B—also purportedly part of a transcript of one of the broadcasts—contains further criticism of the Governor and the legislature in connection with a tax bill, including the following underlined statements:

> The Governor can make all the threats he wants to about not signing the bill, it's just a lead pipe cinch about the whole thing, when they run out of money on the first of July and the Governor's pay check doesn't come through, then he'll sign the bill. That'll happen quickly.

> It seems rather ridiculous to me that we've got all these people [legislators] standing around the halls that don't have anything to do.

Exhibits C and D consist of letters critical of Mr. Robbins' broadcasts which were sent to Mr. Chmielewski or to a newspaper. Exhibit E consists of a transcript of one of the broadcasts criticizing proposals to spend money of the county on an airport in Sandstone.

Exhibit F is furnished as a partial transcript of the broadcast of March 13, 1972. With respect to taxes and planning "On the local levels" Mr. Robbins is quoted as stating,

> And that is a type of planning we're not getting now. Because, you see, when you start paying local managers, and I prefer to call them that—I'm speaking of county commissioners now and the people who are elected to run our counties—when you start paying them the kind of money we are paying them and get no more service out of them than we did back when we were paying them one third as much. We paid them $2,000 and they came to work just as often as they do now for $6,000. So on that basis why I think we can expect that we should be getting a little more management of the county's funds.

Mr. Chmielewski later forwarded to the Commission a copy of a statement Mr. Robbins dated July 15, 1972, addressed to editors of Pine County newspapers and announcing his candidacy for the position of Pine County Commissioner in the Second District. The statement includes the following language:

> It has been said from time to time that Gerry Robbins is too critical of the operation of the Pine County Government. Very obviously I don't totally agree. I have been critical, but find it difficult to be *TOO* critical. I think it's past time that more time was spent in the management of county government. Good business practices must be applied. I have filed for the office of County Commissioner from the 2nd District, and if elected will make every effort to do just that.
>
> Over the past several years the cost of Pine County Government has risen steadily. The rise has been dramatic and not totally necessary. More and more of the spending decisions are being placed in the hands of employees. If a real attempt to reduce costs is to be made, this responsibility must be placed back in the hands of the elected Commissioners . . . I pledge to the voters of Pine County and especially the 2nd District, "If elected, I will spend more time performing the real functions of Pine County Commissioner, if elected I will 'work' at reducing costs in County Government."

LICENSEE'S RESPONSE

By letter dated October 4, 1972, the Commission requested the comments of the licensee on the aforementioned complaints. The licensee was asked to state whether it believed any of the cited issues were controversial issues of public importance at the time they were broadcast; if not, to give reasons underlying its decision; if so, to state whether the licensee had afforded or intended to afford reasonable opportunity for contrasting viewpoints, and to submit a summary of the manner in which the licensee had done or so intended to do so. The licensee also was asked to state whether assertions that Mr. Robbins allegedly had made regarding the purchase and concealment of the pickup trucks, the sale of Kettle River land in violation of the law, the "champagne flight" to Washington, and Senator Chmielewski's role in a proposed increase in state taxes, were in fact broadcast; and, if so, whether they were broadcast during discussions of controversial issues of public importance and whether in the licensee's opinion they constituted attacks upon the honesty, character, integrity of like personal qualities of identified persons or groups. The licensee also was requested to indicate the steps it had taken to comply with the requirements of Section 73.123(a) of the Commission's rules if it had determined that a personal attack was broadcast within the meaning of that section. Finally, the licensee was asked to comment on the allegation that its president was or intended to become a candidate for election to the Pine County Board and had used the station for his personal and private interest "in promoting such candidacy and election."

Under date of October 19, 1972, Mr. Robbins forwarded the licensee's statement, which may be summarized as follows:

1. The program in question, "Six County Chatter," is a public affairs program designed to stimulate the thinking and encourage greater interest in the minds of WCMP's listeners, and stimulate robust and wide open debate.

2. Subjects discussed on the program in May, June, and September 1972 are listed as "typical of the type of topics covered."

3. The licensee not only encourages public officials and the everyday citizen to pass along their ideas and comments, "we go out of our way to invite officials to appear and have offered every service of this Company to make the contribution easier." All signed letters and comments on topics that were broadcast or on new topics are read over the air. Public officials in the area have been invited to appear. "County officials have been invited personally by the Management of the station to appear and report on the activities of the County Board of Commissioners. On rare occasions they have accepted . . . Of course such time has been and will continue to be free." Elected legislative officials also have been invited to appear, personally by management as well as by mail and by telephone, including invitations to "make regular reports on activities of the legislature and the activities of the elected officials." However, "With the exception of canned news releases on very rare occasions, the said officials have declined to use the air to inform the electorate."

4. "At no time has this station, its staff or management used the airways to direct an attack on the personal honesty or integrity of any public official. Any disagreement with these individuals concerns the judgments used by the various political decisions made by them . . ."

5. None of the matters cited by the Commission from transcripts of the broadcasts "were controversial issues." WCMP "is, and has been the only local media actively involved in bringing pending governmental matters to the attention of the listening audience. Area newspapers are weeklies with small staffs with little investigative reporting." Although none of the cited matters were controversial, the station "would have read any comments any official had . . . WCMP; however, received no such letters or request, although, on information and belief, such officials knew the content." Although the topics discussed were not controversial, they were of interest to the public, and comment was invited.

6. None of the specific statements cited constituted an attack upon the honesty, character, integrity or like personal qualities of persons or groups. Although WCMP might not agree with the "wisdom, efficiency or economy of local officials; it has however, the greatest respect for their honesty and integrity."

7. (a) Mr. Robbins' statements on the number of pickup trucks owned by the county "were thought by him to be correct, based on his investigation." (b) It is Mr. Robbins' understanding, after study of the statute and advice of counsel, that the Kettle River land in question "does not meet the criteria outlined for 'Veterans Preference Status.'" (c) "Champagne flight" was meant only as a pun. Station management believed "that rather than a trip to Washington, local efforts at the state level and contacts with Washington through regular channels would be more effective, and more economical." (d) Regarding state tax legislation and Senator Chmielewski's role therein, the Governor had vetoed the new tax bill and an extra session was called and stretched 53 days without an agreement. "Editors of papers all over the state had opinions and expressed them, with the exception of Pine County papers . . . they had very little editorial comment." WCMP felt local discussion was necessary and "Our decision to create an atmosphere of give and take on a local basis, involving the effects locally, was . . . correct." However, "We are sure the Senator's stand on the issue was one that he believed in and . . . that he thought his decision was the correct one." Moreover, during the time of WCMP's comments on the bill, it carried numerous statements with other viewpoints. It carried the Governor's news releases, A.P. wire stories, reports from the minority and majority leaders in the legislature and "at least one, and perhaps more news releases of Senator Chmielewski on the Tax Bill," although his news releases are infrequent.

8. Although on July 17, 1972, Mr. Robbins filed for the office of Pine County Commissioner for the Second District in the Primary Election, he immediately ceased being the host of the program "until after the elections are over. Gerry Robbins, the undersigned, categorically denies using the facilities for purely personal and private interest in promoting such candidacy and election."

9. WCMP offers the opportunity for debate on matters of local public interest and concern, whether controversial or not. It is essentially the only local outlet willing and able to offer one side only, but to get all viewpoints." Further, "Time of unlimited quantity has been offered to any responsible party to discuss items of interest, opposite viewpoints, etc. Time and again the offer has been made. The Senator [Chmielewski] specifically has been offered time for reports to his constituents, to give opinions on legislation, explanations of his positions on issues and reports generally on the legislature and its effects locally. Unfortunately he has accepted this invitation on very few occasions."

ADDITIONAL COMPLAINT

By letter dated October 17, 1972, members of the Pine County Board of Commissioners complained that in a news item broadcast several times by WCMP on October 14, it was falsely stated that the County Engineer's car "had over 11,000 miles on it, over half of which had been used for the transportation of the County Engineer to and from his home." Complainants stated that "It is our feeling that this was clearly a falsehood and not founded on fact in any way" because the County Engineer properly kept the car at his home at night so that he could respond to emergency calls. Complainants again charged that the station was used "for the personal gain of said Gerry Robbins, since he is actively seeking office as a County Commissioner and in doing so, has used his station to slant and rig the news to create public opinion in his favor."

COUNTY BOARD'S COMMENT ON LICENSEE'S RESPONSE

By another letter dated October 17, the County Board of Commissioners commented on the licensee's response to the previous complaints. The Board stated in substance:

1. The correct name of the WCMP program is "Six County Chatter, What's Right and What's the Matter" which "by its terms suggested that controversial matters may be discussed."

2. The topics cited by the licensee for the May, July, and September 1962 broadcasts of the program are not typical of the earlier programs which were the subject of the complaint.

3. Contrary to the licensee's statement, "Complainants at all times prior to April 5, 1972, have appeared on this station when asked, and have further determined that to the best of the knoweldge of the County Sheriff, County Auditor and Clerk of District Court, that they have always appeared on this station when asked."

4. Complainants believe that the licensee attacked their personal honesty and integrity by references to them as having "hoodwinked" a governmental agency "through wasting money by buying pickup trucks and using them for taxi service and hiding the pickup trucks on the Fairgrounds." Complainants also cite Mr. Robbins' reference to a "champagne flight" and the allegation "that the County Board is giving away land under the so-called Veterans Preference Law, which complainants deny."

5. Complainants assert that the matters set forth in their complaint were controversial issues of public importance and were made so by Mr. Robbins' repeated broadcasts about them, and that the licensee has not furnished summaries or copies of his personal attacks to the persons or groups attacked and has not complied with the requirements of the fairness doctrine. Complainants assert that examination of the transcripts previously furnished to the Commission shows that the subjects discussed were controversial.

SENATOR CHMIELEWSKI'S COMMENT

By letter dated October 30, 1972, State Senator Chmielewski commented on the licensee's response in substance as follows:

1. As licensee states, the program is "designed to stimulate thinking, and I must admit that a constroversy follows his editorialization. I believe the violations occur when not only one side of an issue is presented but also when no one is notified to be aware of his editorial. Difference of opinion as to the contents of his editorial arises immediately and since there is no script prepared

for reference by WCMP, those accused and criticized are defenseless unless they would have set up a daily taping session. My duties are out of the range of the station and I do not know when I will be the subject of his daily criticism."

2. Mr. Chmielewski received only one invitation to respond to a Robbins editorial, to which he did promptly respond, during the several years Mr. Robbins has owned WCMP, and he has been unable "to find anyone else that has even been notified."

3. Although the licensee denies questioning the integrity of complainant, "his remarks stating that as a Senator I could care less about a few billion here or 15 billion there since it doesn't come out of my pocket, is a serious reflection on one's character."

4. Public servants could rightfully be reluctant to present news releases to WCMP "since the releases will be literally 'torn to bits' on his morning show."

5. ". . . is it not very evident that [Robbins] has tried to create public opinion strongly in his favor so he could be elected to the County Board of Commission seat for which he has now filed and won the primary election over . . . Commissioner Fred Ausmus?" (Ausmus was the Commissioner who was accused by Robbins of making a "champagne flight" to Washington "to attend the Cherry Blossom Festival.")

F.C.C. 73R-205

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JAMES E. REESE, SHREVEPORT, LA.	Docket No. 19507 File No. BP-18318
RUBY JUNE STINNETT DOWD, EXECUTRIX OF THE ESTATE OF ALVIS N. DOWD, DECEASED, VIVIAN, LA.	Docket No. 19508 File No. BP-18369
E. S. STERLING, JOEL E. WHARTON AND DR. T. J. TALIAFERRO, D.B.A. BOSSIER BROADCASTING CO., BOSSIER CITY, LA. For Construction Permits	Docket No. 19509 File No. BP-18507

ORDER

(Adopted May 31, 1973; Released June 5, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. The Review Board having under consideration a petition for leave to amend to update application pursuant to Section 1.65 of the Rules, filed on April 27, 1973, by James E. Reese;

2. IT APPEARING, That no objections to acceptance of the amendment have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petition for leave to amend IS GRANTED and the amendment therein IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-575

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 89, 91, AND 93 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE USE OF THE FREQUENCY PAIR 451.800/456.800 MHz	Docket No. 19673 RM-1715

REPORT AND ORDER

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On January 29, 1973, the Commission issued a Notice of Proposed Rule Making in the above-entitled matter, which was published in the Federal Register on February 5, 1973, (38 FR 3338). Comments were filed by the Associated Public-Safety Communications Officers, Inc., (APCO) and by the Special Industrial Radio Service Association, Inc., (SIRSA).

2. The Notice of Proposed Rule Making sought comments on our proposal to designate the frequency pair 451.800/456.800 MHz for use by itinerant licensees in the Special Industrial Radio Service for control and repeater purposes, on a secondary basis to mobile operations, in areas more than 75 miles from population centers of 200,000 or more. Our purpose was to accommodate those licensees who conduct their business over large parts of the country and must frequently move their radio facilities from one place to another over considerable distances. The comments supported our proposal. However, SIRSA suggested that we permit the use of this frequency pair by persons who operate temporary base station facilities on "permanent" use frequencies within relatively small areas (such as, within less than 75 miles from their base of operation), and by those who operate radio facilities within 75 miles from the center of the population centers mentioned above.

3. SIRSA had proposed that we permit the use of the frequency pair 451.800/456.800 MHz for fixed operations within the larger population centers in its petition (RM-1715), but we considered and rejected its proposal for the reasons given in our Notice. SIRSA has presented no new facts or arguments and, therefore, its proposal will be rejected.

4. We also reject SIRSA's suggestion that we permit the use of the frequency pair by licensees whose base/mobile systems are on "permanent" use frequencies. Those licensees are engaged in relatively localized operations and are able to coordinate and be licensed to use one of the many other frequencies available for fixed relay and control systems, although they may operate radio facilities at

temporary locations. Thus, they do not face the problems our proposal intended to resolve; and we believe that the existing rule provisions are adequate to meet their needs.

5. In view of the foregoing, we conclude that the public interest would be served by adopting the rule amendments originally proposed.

6. Authority for amendment to the Rules set out in the attached Appendix is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). Accordingly, IT IS ORDERED, That effective July 16, 1973, Parts 89, 91, and 93 of the Commission's Rules ARE AMENDED, as set forth in the attached Appendix.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

I. Part 89 of the Commission's Rules is amended as follows:

§ 89.101 [Amended]

In § 89.101(p) frequencies 451.800 MHz and 456.800 MHz are deleted.

II. Part 91 of the Commission's Rules is amended as follows:

1. Section 91.504, pars (a) and (b) are amended to read as follows:

§ 91.504. Frequencies Available.

(a) * * *

Frequency or band	Class of stations	General reference	Limitations
*	*	*	*
451.800	Operational fixed base and mobile	Itinerant use	12, 28, 35.
*	*	*	*
456.800	Operational fixed base and mobile	Itinerant use	12, 28, 35.
*	*	*	*

* * * * * * *

(b) * * *

(35) This frequency may be assigned to an itinerant fixed control or relay station on a secondary, non-interference basis to land-mobile stations in this service, provided that the fixed relay or control station is to be associated with base and mobile facilities authorized to use other itinerant or general use frequencies available in this service. All such use of these frequencies for fixed systems is limited to locations 100 or more miles from the center of any urbanized area of 200,000 or more population, except that the distance may be 75 miles if the plate input power does not exceed 30 watts. All such fixed systems are limited to a maximum of two frequencies and must employ directional antennas with a front-to-back ratio of at least 15 db. For two-frequency systems, the separation between transmit-receive frequencies is 5 MHz. The centers of urbanized areas of 200,000 or more population are determined from the Appendix, page 226, of the U.S. Commerce publication, "Air Line Distance Between Cities in the United States." Urbanized areas of 200,000 or more population are defined in the U.S. Census of Population, 1960, Vol. 1, Table 23, page 1–50.

III. Part 93 of the Commission's Rules is amended as follows:

§ 93.101 [Amended]

In § 93.101(b), the frequencies 451.800 MHz and 456.800 MHz are deleted.

F.C.C. 73-576

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 2 AND 91 OF THE COMMISSION'S RULES AND REGULATIONS TO ALLOCATE TO THE SPECIAL INDUSTRIAL RADIO SERVICE THE FREQUENCIES 151.490 AND 157.725 MHz	Docket No. 19753 RM-2055

NOTICE OF PROPOSED RULEMAKING

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Special Industrial Radio Service Association, Inc., (SIRSA) has filed a petition requesting amendment of Part 91 of the Commission's Rules to allocate to the Special Industrial Radio Service the frequencies 151.490 and 157.725 MHz. The rule changes sought by SIRSA would permit the use of the two 15 kHz channels, known as "tertiary" frequencies, for "permanent" use systems.

2. SIRSA states that the Special Industrial Radio Service frequencies are heavily congested and the addition of these two frequencies would provide some small measure of relief in the VHF band. Furthermore, SIRSA states it is presently involved in the inter-service coordination of bandedge frequencies and has the mechanism for providing the frequency coordination necessary to implement the assignment of these frequencies. Comments on the SIRSA petition were filed by the Forestry-Conservation Communications Association (FCCA) and by the International Taxicab Association (ITA).

3. We have considered SIRSA's petition and the comments on it carefully, and we propose to grant it insofar as it requests allocation of the frequency 151.490 MHz and to deny it with respect to the frequency 157.725 MHz for the reasons discussed below.

4. The basic rules for the assignment and use of the so-called "tertiary" frequencies in the 150–160 MHz band were adopted in Docket 17703, *Report and Order*, released June 15, 1971, FCC 71-606. In that proceeding, the Commission concluded that operation on these frequencies is possible, without serious adjacent channel interference problems, if there is adequate coordination to insure sufficient geographic separation between radio systems on adjacent channels. Interservice coordination by the respective coordinating committees is required for tertiary frequencies located between frequencies allocated in different radio services. In these situations, therefore, it is necessary to have an established mechanism for interservice coordination.

5. The frequency 151.490 MHz is located between frequencies allocated in the Special Industrial Radio Service and in the Forestry-Conservation Radio Service. In both of these services, the single

frequency method of operation is generally used in both services; and there are frequency coordinating committees and; therefore, the mechanism exists for compatible adjacent uses as well as the required interservice coordination. However, the second frequency sought by SIRSA, 157.725 MHz, is located between a frequency allocated to the Taxicab Radio Service (a two-frequency service) and a frequency allocated primarily for one-way paging (assigned only to base stations) in the Business Radio Service and secondarily in Special Industrial. In the Business Radio Service, there is no coordination of frequencies in the 150–160 MHz band; and therefore, there is no established mechanism for interservice coordination of the frequency. Further, the frequency could be paired with another bandedge frequency, 152.465 MHz; and we anticipate that any action to make these frequencies available for use will consider possibilities of two frequency operation. Accordingly, based on the Commission's determinations in Docket 17703, we believe it would be inadvisable to make the frequency 157.725 MHz available for assignment at this time. For the same reason, we deny the request of the International Taxicab Association that the same frequency be allocated to the Taxicab Radio Service.

6. The Forestry-Conservation Communications Association (FCCA) in its comments on SIRSA's petition, asked that the frequency 151.490 should also be made available in the Forestry-Conservation Radio Service. However, FCCA, beyond merely making the request, offered no justification and demonstrated no need for access to an additional frequency by Forestry-Conservation applicants. Therefore, FCCA's request is denied.

7. Accordingly, we propose to amend Parts 2 and 91 of our Rules to allocate the frequency 151.490 MHz in the Special Industrial Radio Service, except in Puerto Rico and in the Virgin Islands. In Puerto Rico and the Virgin Islands, one of the adjacent frequencies is allocated in the Business Radio Service and for the reason stated above, it would not be advisable to allocate the frequency 151.490 MHz for use by Special Industrial licensees.

8. Authority for the proposed amendments is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before August 16, 1973, and reply comments on or before August 30, 1973. Relevant and timely comments and reply comments will be considered by the Commission before final action in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

9. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and fourteen copies of all statements, briefs, or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

I. Part 2 of the Commission's Rules is amended as follows:

§2.106 TABLE OF FREQUENCY ALLOCATIONS

Worldwide		Region 2		United States		Federal Communications Commission				
Band (MHz)	Service	Band (MHz)	Service	Band (MHz)	Allocation	Band (MHz)	Service	Class of station	Frequency (MHz)	Nature { of services / of stations
1	2	3	4	5	6	7	8	9	10	11
*		*	*		*	*	*	*		*
						150.98–151.4825	Land mobile.	Base.		
								Land mobile.		Public safety (NG51).
						151.4825–152	Land mobile.	Base. Land mobile.		Industrial (NG51).
*		*	*		*	*	*	*		*
		*	*	*	*	*	*	*		

II. Section 91.504 of the Commission's Rules is amended by the addition of the frequency 151.490MHz to the frequency table, and a new limitation (36) is added to paragraph (b) to read as follows:

§ 91.504. Frequencies Available

(a) * * *

Frequency or band	Class of stations	General reference	Limitations
MHz			
*	*	*	*
75.98	do	do	3.
151.490	Base or mobile	Permanent use	11, 36.
151.505	do	Itinerant	12.
*	*	*	*

(b) * * *

(36) This frequency is not available to stations in Puerto Rico or the Virgin Islands.

* * * * * * *

F.C.C. 73-582

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TELEVISION SIGNAL CORP., SAN FRANCISCO, CALIF. For a Construction Permit in the Cable Television Relay Service	CPCAR-395

MEMORANDUM OPINION AND ORDER

(Adopted May 31, 1973; Released June 6, 1973)

BY THE COMMISSION:

1. Pending before the Commission is an application for a microwave radio station in the Cable Television Relay Service (Part 78 of the Commission's Rules) filed by Television Signal Corporation (TSC). The application, as amended, is for authority to carry by microwave the signals of KCRA-TV, KXTV, and KTXL, all of Sacramento, California, and KOVR of Stockton, California to an existing, 20,000 subscriber cable system owned by TSC in San Francisco, California. The cable system now carries these signals on an "off-air" basis and simply wishes to improve the quality of the four signals as supplied to its subscribers.

2. The American Broadcasting Company (ABC), licensee of Station KGO-TV of San Francisco, filed a timely objection to the application grounded upon the premise that the four signals are not now, and never have been, authorized for carriage on the attendant cable system since no Section 74.1105 notice had been given and no certificate of compliance obtained, and that the Commission should not license TSC to carry the signals by microwave radio transmission to a cable system unauthorized to carry them. TSC filed a timely opposition to ABC's objection stating, in short, that all signals to be carried by microwave were being carried prior to March 31, 1972, that the cable systems had been in continuous operation since prior to 1960, that each of the signals placed a Grade B contour over San Francisco, that notice of the initial carriage of these signals was not required under Section 74.1105 of the Commission's Rules,[1] and hence, that

[1] Section 74.1105 was the controlling rule prior to March, 1972. It stated in pertinent part: "No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless [appropriate advance notice to the Commission and local broadcasters had first been given]." Although the Commission proposed an amendment to the section in 1969 that would have required advance notice of the addition of Grade B signals to existing systems (*Notice of Proposed Rule Making in Docket 18416*, FCC 69-9, —— FCC 2d —— (1969), the change was never adopted, and the proposal was subsequently superseded by the rules adopted in the *Cable Television Report and Order*, 36 FCC 2d 141 (1972).

carriage is authorized. ABC replied, acknowledging that TSC's statement of the law was correct, but arguing that it had not been satisfactorily established that TSC was operating a cable system prior to 1966 and that it had not been shown that the four signals were reasonably viewable at the time of grandfathering in 1972.[2] TSC responded,[3] with supporting exhibits, showing that the cable system was operating as a cable system prior to 1966 and that the signals were reasonably viewable at the time of grandfathering.

3. From the undisputed facts [4] it appears that TSC was in operation prior to February 15, 1966,[5] that carriage of the signals in question was commenced prior to March 31, 1972, that the signals are and have been carried on the system in a reasonably viewable condition,[6] and that the signals in question place Grade B signal contours over the cable community so that the notice requirement of former Section 74.1105(a) did not apply to their addition. It thus appears that the signals in question were signals that the cable system "was authorized to carry or was lawfully carrying prior to March 31, 1972." within the meaning of Section 76.65 of the Rules and that their continued carriage is in full compliance with the Commission's Rules.[7] Having concluded that carriage of these signals is authorized by the Rules and no other reasons having been advanced by ABC as to why continued carriage of these signals should not be permitted, we will deny its objection.

4. It appearing that no further substantial question concerning the subject applications remains, that Television Signal Corporation is a qualified and eligible applicant, and that the public interest will be served by authorization of the facilities applied for, we will grant the requested construction permit.

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[2] As to the requirement that the signals must be reasonably viewable if they are to be grandfathered, both ABC and TSC rely on *Video Service Company*, 20 FCC 2d 676 (1969), *review denied*, 22 FCC 2d 676 (1970).

[3] TSC petitioned for leave to file this further pleading. We find good cause for accepting it in light of the new arguments, posed in the ABC reply, to which it responds.

[4] Although it initially raised questions as to what the true facts were, ABC has not questioned the TSC response or provided any contradictory facts of its own. In its October 3, 1972 reply, ABC indicated that it was undertaking itself to ascertain the specific facts. However, no further facts were provided.

[5] February 15, 1966 is the grandfather date established in the *Second Report and Order in Docket 14895*, 2 FCC 2d 725 (1966). The TSC Form 325 on file with the Commission indicates that the system first commenced operation in October, 1954.

[6] Photographs submitted with the March 20, 1973, response of TSC taken in October, 1972 "seven amplifiers deep in the system" that are said to show the quality of the signals since the time they were initially carried, show the signals to have been of viewable quality.

[7] Section 76.65 states in pertinent part "The provision of §§ 76.57, 76.59, 76.71 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972."

Accordingly, IT IS ORDERED, That the "Objection" filed August 14, 1972 by American Broadcasting Company IS DENIED.

IT IS FURTHER ORDERED, Pursuant to Section 309 of the Communications Act of 1934, as amended, and Part 78 of the Commission's Rules, that the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

41 F.C.C. 2d

F.C.C. 73-584

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TIMNANKIN, INC. For Renewal of License for Station KOOD, Lakewood, Wash.	BR-3760

MEMORANDUM OPINION AND ORDER

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION:

1. The Commission has before it for consideration an informal petition for reconsideration, filed September 27, 1972, by Timnankin, Inc., licensee of Standard Broadcast Station KOOD, Lakewood, Washington.

2. By letter dated September 13, 1972, FCC 72-810, 37 FCC 2d 680, the Commission, *inter alia*, denied Timnankin, Inc.'s, March 21, 1972 request for reinstatement of the silence authorization for KOOD, dismissed its January 6, 1969 application for renewal of KOOD's license, thus terminating the station's authorization to operate, and deleted the station's call letters. The sole ground urged in support of its petition for reconsideration is that the Commission failed to take into account the fact that Clay Huntington had filed an application for assignment of KOOD's license. While the Commission's records disclose that such an application was submitted on August 14, 1972, this application was substantially incomplete and, therefore, could not be accepted for filing.[1] Accordingly, it does not appear that the mere submission of this application constitutes a valid reason for reconsideration of the Commission's September 1972 decision.

3. Further, as is apparent from the Commission's September 1972 decision, there were several reasons which lead to the dismissal of Timnankin, Inc.'s application for renewal of KOOD's license. The instant petition for reconsideration sets forth no new arguments, facts, or explanations relating to these other reasons. It is well-established that reconsideration will not be granted merely for the purpose of again debating matters upon which we have once debated and spoken. *WWIZ, Inc.* 37 FCC 685 (1964); *Florida Gulfcoast Broadcasters, Inc.*, 37 FCC 833 (1964). We have, nevertheless, again reviewed our September 1972 decision in light of Timnankin, Inc.'s present contention.

[1] Under normal circumstances the application would have been returned to Huntington with a letter of explanation. However, in view of the Commission s action of September 13, 1972, the Huntington application was returned as obsolete.

We are convinced that there is no reason which warrants a departure from our previous findings and conclusions contained in that decision, wherein it was noted that: (1) the station had been silent since May 1, 1969, a period of more than three years, and silent without Commission authorization since January 1, 1972; (2) Timnankin, Inc. had failed to file a supplemental renewal application for KOOD as required on or before November 3, 1971; and (3) Timnankin, Inc. had failed to file its annual license fees or to respond to notices advising it to pay those fees. We conclude, therefore, that the public interest will be best served by selecting on a comparative basis the best qualified *de novo* applicant for the frequency occupied by KOOD.

4. In connection with the above, on April 12, 1973, the Commission issued a Public Notice (No. 96421) accepting the applications of Dale A. Owens and Clay Huntington for the frequency assigned to KOOD and notified other interested parties that conflicting proposals, in order to be consolidated for hearing, had to be tendered for hearing no later than May 25, 1973. However, since final dispositive action had not been taken on Timnankin, Inc.'s petition for reconsideration, by Order adopted May 10, 1973, released May 11, 1973, FCC 73–507, the Commission set aside its acceptance of the Owens and Huntington proposals until such time as final action was taken on the petition for reconsideration. In view of our decision that the Timnankin, Inc. petition for reconsideration must be denied, we are issuing another Public Notice which accepts the Owens and Huntington proposals and notifies other interested parties that conflicting proposals, in order to be consolidated for hearing, must be filed on or before July 16, 1973.

5. In view of the above, IT IS ORDERED, That the petition for reconsideration, filed September 27, 1972, by Timnankin, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-612

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of UNITED TELEVISION CO., INC., (WFAN-TV), WASHINGTON, D.C. For Renewal of License	Docket No. 18559 File No. BRCT-585
UNITED TELEVISION CO., INC. (WFAN-TV), WASHINGTON, D.C. For Construction Permit	Docket No. 18561 File No. BPCT-3917
UNITED BROADCASTING CO., INC. (WOOK), WASHINGTON, D.C. For Renewal of License	Docket No. 18562 File No. BR-1104
WASHINGTON COMMUNITY BROADCASTING CO., WASHINGTON, D.C. For Construction Permit for New Standard Broadcast Station	Docket No. 18563 File No. BP-17416

ORDER

(Adopted June 6, 1973; Released June 12, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT

1. The Commission has before it for consideration: (a) an order, FCC 73-371, 40 FCC 2d 472, released April 9, 1973, directing United Television Company, Inc. (United) to resume the operation of television station WFAN-TV, Washington, D.C.; (b) a petition for stay of (a) above, filed May 9, 1973, by United; and (c) an opposition to (b) above, filed May 23, 1973, by the Chief, Broadcast Bureau.

2. In the above-referenced order, we denied United's request to continue to suspend operation of Station WFAN-TV pending Commission action on an application for assignment of license of that station. Noting that United could not be permitted to assign its authorization until all questions concerning its character qualifications have been favorably resolved,[1] and recognizing that such a resolution might not occur for a period of several years since three other hearings are involved,[2] we found that the public interest would best be served by returning this facility to operation at the earliest possible time. We thus ordered United to resume the operation of WFAN-TV by no later than 12:01 a.m., July 1, 1973.

3. In its petition, United requests that we stay the effectiveness of the above-referenced order pending resolution of United's petition for

[1] *United Television Company of New Hampshire*, 38 FCC 2d 400 (1972).
[2] See Docket Nos. 19336-19338; 19412; and 19664.

reconsideration thereof.[3] In support, United claims that it would be both inequitable and contrary to the public interest to require it to commence operation in light of its heavy past financial losses and its presently inadequate, noncompetitive and inoperable facility. United alleges that it is a violation of administrative due process to require it either to operate this station or turn in its license. United further argues that it will suffer irreparable injury in that, without such a stay, it would effectively be precluded from requesting Commission reconsideration of that order. In its opposition, the Broadcast Bureau states that United has shown neither irreparable injury nor a likelihood of success based on its petition for reconsideration. The Bureau argues that a grant of United's reconsideration request would not serve the public interest and is contrary to Section 1.106(a)(1) of our Rules. Finally, the Bureau maintains that the public interest requires an early resumption of operation of WFAN-TV.

4. Notwithstanding the Bureau's arguments, we believe, in light of the peculiar circumstances presented here, that the orderly disposition of our business will be best served by a grant of United's request and that sufficient good cause has been shown to warrant staying the effectiveness of our order pending consideration of United's petition for reconsideration.

5. Accordingly, IT IS ORDERED, That the petition for stay filed May 9, 1973, by United Television Company, Inc., IS GRANTED, and the effectiveness of the Commission Order, FCC 73-371, 40 FCC 2d 472, released April 9, 1973, IS STAYED, until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] United's petition for reconsideration was filed on May 9, 1973.

F.C.C. 73-613

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF LICENSE OF UNITED TELEVISION CO. OF NEW HAMPSHIRE FOR TELEVISION STATION WMUR, MANCHESTER, N.H.	Docket No. 19336
In Re Applications of UNITED TELEVISION CO. OF EASTERN MARYLAND, INC., FOR TELEVISION STATION WMET, BALTIMORE, MD.	Docket No. 19337 File No. BRCT-635
For Renewal of License KECC TELEVISION CORP. FOR LICENSE TO COVER CONSTRUCTION PERMIT (BPCT-3079) AS MODIFIED, AUTHORIZING A NEW TELEVISION STATION (KECC-TV), AT EL CENTRO, CALIF.	Docket No. 19338 File No. BLCT-2099

ORDER

(Adopted June 6, 1973; Released June 12, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it for consideration: (a) an order, FCC 73-372, 40 FCC 2d 474, released April 9, 1973, directing United Television Company of Eastern Maryland, Inc. (United) to resume the operation of television station WMET, Baltimore, Maryland; (b) a petition for stay of (a) above, filed May 9, 1973, by United; and (c) an opposition to (b) above, filed May 23, 1973, by the Chief, Broadcast Bureau.

2. In the above-referenced order, we denied United's request to continue to suspend operation of Station WMET for such period of time as to permit the completion of the hearing in this proceeding "and thereafter to act on an application for assignment of license" of WMET. Noting that United could not be permitted to assign its authorization until all questions concerning its character qualifications have been favorably resolved,[1] and recognizing that such a resolution might not occur for a period of several years since three other hearings are involved,[2] we found that the public interest would best be served by returning this facility to operation at the earliest possible time. We thus ordered United to resume the operation of WMET by no later than 12:01 a.m., July 1, 1973.

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[1] *United Television Company of New Hampshire*, 38 FCC 2d 400 (1972).
[2] See Docket Nos. 18559, 18561-18563; 19412; and 19664.

3. In its petition, United requests that we stay the effectiveness of the above-referenced order pending resolution of United's petition for reconsideration thereof.[3] In support, United claims that it would be both inequitable and contrary to the public interest to require it to commence operation in light of its heavy past financial losses and its presently inadequate, noncompetitive and inoperable facility. United alleges that it is a violation of administrative due process to require it either to operate this station or turn in its license. United further argues that it will suffer irreparable injury in that, without such a stay, it would effectively be precluded from requesting Commission reconsideration of that order. In its opposition, the Broadcast Bureau states that United has shown neither irreparable injury nor a likelihood of success based on its petition for reconsideration. The Bureau argues that a grant of United's reconsideration request would not serve the public interest and is contrary to Section 1.106 (a) (1) of our Rules. Finally, the Bureau maintains that the public interest requires an early resumption of operation of WMET.

4. Notwithstanding the Bureau's arguments, we believe, in light of the peculiar circumstances presented here, that the orderly disposition of our business will be best served by a grant of United's request and that sufficient good cause has been shown to warrant staying the effectiveness of our order pending consideration of United's petition for reconsideration.

5. Accordingly, IT IS ORDERED, That the petition for stay filed May 9, 1973, by United Television Company of Eastern Maryland, Inc., IS GRANTED, and the effectiveness of the Commission Order, FCC 73-372, 40 FCC 2d 474, released April 9, 1973, IS STAYED. until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] United's petition for reconsideration was filed on May 9, 1973.

F.C.C. 73-603

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
THE WESTERN UNION TELEGRAPH CO.
Transmittal No. 6876 Dated April 18, 1973, Submitting Revisions to Public Message Telegram Tariff F.C.C. No. 255, Money Order Tariff F.C.C. No. 229, Telex Tariff F.C.C. No. 240 and Mailgram Service Tariff F.C.C. No. 256

MEMORANDUM OPINION AND ORDER

(Adopted June 6, 1973; Released June 11, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. On April 18, 1973, the above-captioned revised tariff schedules were filed by The Western Union Telegraph Company (WU), under Transmittal No. 6876, to become effective June 17, 1973. These schedules proposed certain increases in charges and were thus filed on 60 days' notice as required by Part 61 of our rules. The attachment hereto describes the proposed changes. WU estimates that the overall effect of the revisions will be to provide additional revenues of approximately $2.2 million in the last half of 1973, $4.8 million in 1974, and $5.6 million in 1975.

2. At the time WU submitted its tariff filing, it also submitted detailed cost and other supporting data as required by Section 61.38 of our Rules. However, without disputing any of the factual showings made therein as to WU's costs, revenues and present and projected earnings, Microwave Communications, Inc. (MCI) filed a pleading on or about May 11, 1973 entitled "Petition For Rejection or Suspension." In this petition, MCI purports to support its filing with a number of conclusionary allegations, namely, that "We are further of the opinion that the newly proposed increases . . . are part and parcel of Western Union's anticompetitive attempts to foreclose competitive markets to companies with no sources of monopoly revenues", that "there is substantial reason to believe that Western Union is cross-subsidizing its competitive services with its monopoly services"; and that "Western Union will continually need to increase its monopoly services in order to subsidize its competitive rate reductions."

3. MCI's pleading is procedurally defective in that it violates Section 1.44(a) of our rules prohibiting joinder of requests for action delegated to the staff (rejection of tariffs) and for action by the Com-

mission (suspension of tariffs and designation for hearing).[1] We have heretofore refused to consider such defective pleadings. (See 39 F.C.C. 2d, 637, 639 (1973)). We shall therefore dismiss MCI's petition for violation of our rules.

4. MCI's petition is also substantively defective. The conclusionary allegations in this procedurally defective petition are in disregard of a specific ruling made by us on December 29, 1972, in another case in which MCI was also the petitioner. Our ruling then was that conclusionary allegations, unsupported by any factual showing, are unacceptable and unpersuasive to the Commission and that we expect factual showings in any pleadings that reply upon assertions that rate proposals have anticompetitive effects (See AT&T Rate Case, Docket 19129, 38 F.C.C. 2d 981, at page 983 (1972)). Accordingly, MCI's petition is also dismissed on substantive grounds.

5. Our action herein is not to be interpreted as approving or disapproving WU's revised tariffs, or of foreclosing MCI or anyone else from challenging the validity of these tariffs by properly supported complaint or petition. Moreover, WU has not submitted in sufficient detail its proposals for notifying the public of these changes and we shall require WU to provide such notices as prescribed by the Chief, Common Carrier Bureau.

6. In view of the foregoing, IT IS ORDERED, That MCI's petition to reject or suspend IS DISMISSED and that WU promptly provide such notices to the public of these changes in the form and manner prescribed by the Chief, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

ATTACHMENT

DESCRIPTION OF TARIFF REVISIONS SUBMITTED BY WESTERN UNION WITH TRANSMITTAL NO. 6876

1. An increase in the charges for intra-United States messages in the Overnight Telegram classification from the present rates of $1.70 for the first 100 words or less and $.015 for each additional word over 100 to $3.00 for the first 100 words or less and $.03 for each additional word over 100 words.

2. An increase in the flat-rate charge for individual Personal Opinion Messages (POM) from the present $1.25 per message to $2.00; also an increase in the rates for identical POM messages to all U.S. Senators from $50 to $80, to all U.S. Representatives from $75 to $120, and to all U.S. Senators and Representatives combined from $100 to $160. At the same time the expiration date of the special rates applicable to such identical POM messages to Congressmen is being deleted in view of the continuing demand for such service.

3. Revisions in the telegram delivery methods to reflect that Telegrams and Overnight Telegrams on which customers do not specify the method of delivery, the delivery method will be by telephone or by tieline rather than by messenger; also that deliveries to business concerns will not be made after normal business hours and on weekends or holidays unless instructions to the contrary are placed with the Telegraph Company.[2] The company's current practice provides that de-

[1] MCI also filed a motion to consolidate any hearing on these revised tariff schedules with another proceeding; however, in light of our action herein, this motion is moot.
[2] By the addressee.

liveries to business concerns will be made after normal business hours and on weekends and holidays unless instructions to the contrary are placed with the Telegraph Company.

4. An increase in the charge for messenger delivery of messages in the Telegram and Overnight Telegram classifications from the present charge of $1.50 to $3.00 per message. Pick-up charges for such telegrams are being increased from $1.50 to $3.00. The messenger handling charges on Public Facsimile messages are being changed from $1.00 for each pickup made within an airline distance of one mile from the nearest office accepting facsimile messages, plus $.50 for each additional airline mile or fraction thereof to a flat charge of $3.00 for each pickup.

5. An increase in the charge for mailing to the sender a confirmation copy of a Telegram or Overnight Telegram filed by him over the telephone from the present $.25 to $.50. Confirmation copies of messages delivered by telephone will continue to be provided upon request to the addressee without charge.

6. An increase from the present charge of $.25 to $.50 for collect service on messages in the Telegram, Overnight Telegram and Public Facsimile classifications.

7. A change in the regulations and rates applicable to the delivery of money orders to reflect that the normal means of effecting delivery will be to notify the payee to call for the money order at the paying office of destination. An additional charge of $3.00 per order will be applicable for messenger delivery within the established delivery limits of the destination office. Also, money orders accepted by telephone or picked up by messenger will be charged for in the same manner as telegrams. There is currently no extra charge for messenger delivery of money orders.

8. An increase in the basic charges for Overnight Money Orders from $2.65 to $3.95 in line with a similar increase for Overnight Telegrams from $1.70 to $3.00. No change is being made in the basic rates for Day Money Orders.

9. An increase from $2.00 to $3.00 in the service charge applicable to Tel(T)ex messages. Tel(T)ex service provides for the transmission by Telex subscribers of messages over Telex facilities to a serving destination telegraph office and for the local delivery by the Telegraph Company of such messages.

10. A new regulation and rate in the delivery practices of Tel(T)ex messages to provide that normal delivery of such messages will be by telephone or tieline. When messenger delivery is specified by the customer, a $3.00 delivery charge will be made for messages within the delivery limits of the destination point in the same manner as proposed for Telegrams, Money Orders and Public Facsimile messages.

11. An increase in the charges for MAILGRAM messages filed by telephone, tieline, or over the counter from the present $1.60 to $2.00 for 100 words or less and from $.80 to $1.00 for each additional 100 words or less.

12. A reduction of one hour in the maximum time period during which the Telegraph Company will undertake to deliver or attempt to deliver telegrams and day money orders; so that where the present tariff provides guaranteed delivery times within 4, 6 or 8 hours for telegrams and money orders, the delivery times will be 3, 5 or 7 hours.